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o. 83-935-CFY
tatus: GRANTED

ocketed:
ecember 6, 1983

Title: United States, Petitioner
v.
John Clyde Abel

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Gomez,Yolanda Barrera

ntry	Date	Note	Proceedings and Orders
1	Oct 25 1983		Application for extension of time to file petition and order granting same until December 6, 1983 (Rehnquist, October 26, 1983).
2	Dec 6 1983	G	Petition for writ of certiorari filed.
3	Jan 11 1984		DISTRIBUTED. February 17, 1984
4	Jan 26 1984	P	Response requested. (Due February 25, 1984 - NONE RECEIVED)
5	Feb 27 1984		Brief of respondent John Clyce Abel in opposition filed.
6	Feb 27 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Feb 28 1984		REDISTRIBUTED. March 16, 1984
8	Mar 14 1984	X	Reply brief of petitioner United States filed.
9	Mar 19 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Mar 19 1984		Petition GRANTED.
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11	Apr 20 1984		Joint appendix filed.
13	May 1 1984		Order extending time to file brief of petitioner on the merits until June 2, 1984.
14	Jun 4 1984		Brief of petitioner United States filed.
16	Jun 26 1984		Order extending time to file brief of respondent on the merits until July 31, 1984.
17	Jul 6 1984	G	Motion of respondent for appointment of counsel filed.
18	Jul 18 1984		DISTRIBUTED. September 24, 1984. (ABOVE MOTION).
19	Jul 30 1984		Brief of respondent John Clyce Abel filed.
20	Aug 28 1984		SET FOR ARGUMENT. Wednesday, November 7, 1984. (2nd case)
21	Aug 29 1984		CIRCULATED.
22	Oct 1 1984		Motion for appointment of counsel GRANTED and it is ordered that Yolanda Barrera Gomez, Esq., of Los Angeles, California, is appointed to serve as counsel for the respondent in this case.
23	Nov 7 1984		ARGUED.

83-935

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA

v.

JOHN CLYDE ABEL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a witness may properly be impeached by showing that he and the party for whom he testifies belong to a group whose members are sworn to commit perjury on each other's behalf.

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UNITED STATES OF AMERICA

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JOHN CLYDE ABEL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 707 F.2d 1013.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983, and amended on June 6, 1983. A petition for rehearing was denied on September 7, 1983 (App., *infra*, 11a). Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent

was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and sentenced to 25 years' imprisonment (App., *infra*, 1a).[1] A divided panel of the court of appeals reversed his conviction.

1. On September 8, 1981, four men robbed the Bellflower Savings and Loan Association in Bellflower, California (1 Tr. 123-128, 131; 2 Tr. 190-192; GX 11, 12).[2] A witness observed the license number of the getaway car, a white Camaro, and the FBI determined that the car was registered to Anna Sainz (1 Tr. 130-131; 2 Tr. 194; GX 9, 10, 18).

Later that day, several members of the Los Angeles County Sheriff's Office interviewed Sainz at her home (2 Tr. 202-203, 206-261, 284). She told the officers that she had loaned the car that morning to respondent, who had left in it with her housemate Ronald Gremard and another man (2 Tr. 195, 198, 208, 214-215). She said that respondent and Gremard had later returned the car and departed again in respondent's Ford pickup truck (2 Tr. 198-202). Sainz expected them both to return that evening (2 Tr. 201). The officers searched the house with Sainz's consent and found a bank bag in one of the bedrooms (2 Tr. 263-265, 285; GX 2). They then awaited the return of respondent and Gremard (2 Tr. 265-269, 275-276).

After dark, respondent and Gremard returned to the house in a Ford pickup truck and were arrested (2 Tr. 202-203, 205-206, 265-269, 275-276). The officers seized

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[1] Ronald Gremard and Kurt Edward Ehle, who were indicted together with respondent, pleaded guilty. As part of his plea bargain, Ehle testified for the government (App., *infra*, 2a).

[2] Bank employees and a bank visitor identified respondent from a photo spread as one of the armed robbers who appears in a bank surveillance photograph (1 Tr. 71-73, 79-80, 87-89, 105-108, 121-122, 136-138, 140-141, 143, 150, 152-153; 2 Tr. 229, 308-311; GX 16).

some clothing from the seat of the pickup (2 Tr. 286-287, 291-292; GX 8). A search of respondent's person at the police station where he was taken uncovered a bait bill from the Bellflower Savings and Loan and eight Susan B. Anthony silver dollars alleged to have been taken in the robbery (1 Tr. 113-115; 2 Tr. 288-290, 292-293; GX 3, 4, 23-A).

At trial, Kurt Ehle, one of respondent's codefendants, testified for the government and implicated respondent as one of the bank robbers. Respondent called Robert Mills to impeach Ehle. Mills, who was imprisoned with Ehle and respondent and had been friendly with them both, testified that Ehle had said that he intended to give false testimony identifying respondent as one of the robbers in order to obtain a more lenient sentence. App. A, *infra*, 4a. Before cross-examination began, the prosecutor informed the court, out of the presence of the jury, that he intended to examine Mills about his membership in the "Aryan Brotherhood."[3]

Defense counsel objected on narrow grounds. She conceded that Mills's membership in the Aryan Brotherhood was relevant but stated (3 Tr. 388-389):

> I think, your Honor, it would be relevant, but only as far as asking, for example, "Isn't it true that you belong to an organization where you try to protect each other?," or "Isn't it true that you belong to an organization that you would be willing to lie for another member?" I think that's the farthest that something like that should be allowed to get to, but not the mention of "Aryan Brotherhood" or

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[3] The Aryan Brotherhood is "a white supremacist prison gang." *United States* v. *Mills*, 704 F.2d 1553, 1555 (11th Cir. 1983), petition for cert. pending, No. 83-5286.

any other organization that has the type of connotations that the Aryan Brotherhood has.

* * * * *

Your Honor, I think * * * it's too prejudicial to be allowed in a trial.

The court then held that the evidence was admissible and that its probative value outweighed any possibility of prejudice (3 Tr. 389-390).

Before cross-examining Mills on this subject, the prosecutor requested a side-bar conference and outlined the questions he proposed to ask (3 Tr. 437). Defense counsel responded (*ibid.*) that "the U.S. Attorney may perhaps get into whether they belong to any organization," but she objected to any "reference to the Aryan Brotherhood or * * * any kind of motto * * *."[4] The court therefore ruled (3 Tr. 438) that the prosecutor should refer to a "secret prison organization" rather than naming the Aryan Brotherhood. Although this ruling appeared to eliminate defense counsel's sole ground for objection, she objected without explanation when Mills was asked the following questions (3 Tr. 439-440):

Q Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?

A No, I don't.

Q Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that the members thereof will first of all deny they belong to that secret organization?

A No, I don't.

* * * * *

[4] The prosecutor's offer of proof indicated that the organization's motto is "Blood in, blood out," which means that "[t]he only way you get out of it is to get killed and the only way you get into it is either kill somebody yourself or be present when somebody is killed and participate in it." 3 Tr. 367, 370. This evidence was not introduced.

Q And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in that secret organization, prison organization?

A I know of no organization like that.

In rebuttal, the government called Ehle, who testified that both Mills and respondent were members of a secret prison organization whose members were pledged to deny the organization's existence and to "lie, cheat, steal [and] kill * * *" to protect other members (App., *infra*, 6a; 3 Tr. 504). Defense counsel stated (3 Tr. 505) that she objected "under [Fed. R. Evid.] 403 and 608" but did not elaborate.

The judge offered upon request to instruct the jury not to consider Ehle's testimony for any purpose other than assessing Mills's credibility. Respondent did not request such an instruction. 3 Tr. 413-414.

2. A divided court of appeals reversed respondent's conviction.[5] Conceding that a trial court has broad discretion to admit or exclude evidence (App., *infra*, 6a), the court of appeals nevertheless held that the trial judge had committed reversible error by allowing Mills

[5] The court of appeals upheld the denial of respondent's motion to suppress the money found on his person after his arrest (App., *infra*, 2a-3a). The court held that the sheriff's officers had probable cause to arrest respondent and that the search was properly made incident to arrest (*ibid.*). For the same reason, the court upheld the denial of respondent's motion to suppress the shirt found on the seat of the pickup (*id.* at 3a n.1).

Because of its disposition of the impeachment issue, the court of appeals did not decide whether the trial judge erred in refusing to permit respondent to call an alibi witness whose name did not appear on respondent's notice of intention to offer an alibi defense (*id.* at 4a).

to be impeached by proof that he and respondent belonged to a group whose members were sworn to commit perjury on each other's behalf (*id.* at 5a).

Observing that the government may not convict an individual merely for belonging to an organization that advocates illegal activity (*Scales* v. *United States*, 367 U.S. 203, 219-224 (1961); *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969)), the majority reasoned (App., *infra*, 5a):

> Neither should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value. It establishes nothing about the individual's own actions, beliefs or veracity.

The majority added that the "suggestion of perjury, based purely on a group tenet, without any showing that Mills personally accepted such a tenet, * * * makes such testimony unacceptable" (*id.* at 6a). The court also found that the rebuttal testimony had unfairly prejudiced respondent "by mere association" (*id.* at 7a).

Judge Kennedy dissented (*id.* at 8a-10a). He stated (*id.* at 8a) that "[t]he line of questioning barred by the majority in this case is akin to inquiry respecting family ties, prior business relations, or the myriad other past or present associations that may cause a witness, consciously or otherwise, to color his testimony. There is consensus that such matters are admissible, as probative on the issue of bias." He added (*ibid.*) that "if the tables were turned and a key prosecution witness were a member of a gang such as the one here, I should think it would be error to reject defense efforts to show bias through gang membership. See *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974) * * *."

Judge Kennedy found *Scales* and *Brandenburg* inapposite because "[t]hey stand only for the proposition that membership alone is not sufficient for the imposition of a penalty" and do not preclude consideration of

membership in assessing a witness's possible bias (App., *infra*, 9a). He elaborated (*ibid.*): "The witness who is impeached by membership in a group sworn to perjury is subject to no sanction other than that his testimony may be disbelieved."

Judge Kennedy stated (*id.* at 10a) that a trial judge has discretion to admit extrinsic evidence showing bias, and he concluded (*ibid.*) that the trial judge in this case had not abused that discretion in holding that the probative value of Ehle's testimony outweighed the possibility of unfair prejudice to respondent.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case is a startling departure from settled law regarding proof of a witness's bias. No authority supports the court's holding that a witness may not be impeached by showing that he and the party on whose behalf he testifies belong to the same group, let alone a group whose members are sworn to commit perjury on each other's behalf. Common sense indicates that such membership may have an important bearing on a witness's credibility. Not only is the decision below contrary to established law and reason, but it may greatly hamper efforts to combat the increasing number of crimes committed by tightly-knit prison gangs, terrorist groups, and other similar organizations. Review by this Court is therefore warranted.

1. The importance of evidence of a witness's bias is well recognized. As this Court has stated: "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' " *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974), quoting 3A Wigmore, *Evidence* § 940, at 775 (Chadbourn rev. ed. 1970). Accord, 3 Weinstein & Berger, *Weinstein's Evidence* ¶ 607[03], at 607-30 to 607-32 (1982); *McCormick on Evidence* § 40, at 78 (2d ed. 1972); 3 Louisell & Mueller, *Federal*

Evidence § 341, at 470 to 484 (1979). Indeed, that is precisely what respondent was doing in calling Mills to testify about Ehle's motive for testifying against respondent, and no one could seriously suggest that such evidence was inadmissible.

There also is little doubt that evidence of membership in a group may be relevant to show bias. As one leading commentator puts it (3 Weinstein & Berger ¶ 607[03], at 607-30 to 607-32) (footnotes omitted): "Relationships between a party and a witness are always relevant to a showing of bias whether the relationship is based on ties of family, sex * * *[,] employment, business, friendship, enmity or fear." Another commentator states (*McCormick on Evidence* § 40, at 78 (2d ed. 1972)):

> Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility. The kinds and sources of partiality are too infinitely varied to be here reviewed * * *.

See also 3 Louisell & Mueller, *Federal Evidence* § 341, at 470-484; 3A Wigmore, *Evidence* § 949, at 784-786.

Proof of bias "is never considered collateral: Extrinsic evidence of bias, or of facts from which it may be inferred, may be introduced even after the witness has denied the bias, or the facts, on cross-examination." 3 Louisell & Mueller § 341, at 470-471 (footnote omitted); see also, *e.g.*, *United States* v. *Frankenthal*, 582 F.2d 1102, 1106 (7th Cir.1978); *United States* v. *Moore*, 554 F.2d 1086, 1091 n.34 (D.C. Cir. 1976); *United States* v. *Brown*, 547 F.2d 438, 445-446 (8th Cir.), cert. denied, 430 U.S. 937 (1977); *United States* v. *Harvey*, 547 F.2d 720, 722 (2d Cir. 1976).

These rules are based upon "the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties." *McCormick on Evidence* § 40, at 78. Common sense and experience suggest that a witness will tend to give testimony favorable to a party he likes and unfavorable to a party he dislikes.

Thus, any evidence from which partiality may be inferred—including common membership in a group— is important in assessing a witness's credibility.

Tempering the rule permitting proof of a witness's bias is the recognition that "the trial judge may * * * in both civil and criminal cases, impose reasonable limits upon attempts to show bias in the interest of preventing harassment of witnesses, unfair prejudice to parties, confusion of issues, or undue consumption of time, all pursuant to Rules 403 and 611 [of the Federal Rules of Evidence]." 3 Louisell & Mueller § 341, at 471-473 (footnote omitted).

2. In departing from these black letter rules, the court of appeals reasoned (App., *infra*, 5a) that since "the government may not convict an individual merely for belonging to an organization that advocates illegal activity * * * [n]either should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value."

The court confused two fundamentally different concepts: those facts that may be made a crime and those facts that may be considered in determining whether a crime has been committed. For example, it is obvious that characteristics such as race, gender, and age may not be made a crime. But there is no doubt that such characteristics may be proved in criminal trials where relevant. For instance, race or gender may be relevant to identification, and age may be relevant if physical strength is at issue. Proof of group membership stands on the same footing. Even though mere membership generally may not be made a crime, membership may be proved where relevant, including where relevant to show bias.

The court of appeals' reasoning suggests that evidence bearing upon a witness's credibility may not be admitted unless it is sufficient to prove a criminal of-

fense. That principle would revolutionize the law of evidence and lead to patently absurd results. For example, under present law a witness may be impeached by proof of his reputation for untruthfulness (Fed. R. Evid. 608(a)) even though persons may not be convicted solely because of their reputations. Likewise, although family relationships are not a crime, it is universally recognized that a witness may be impeached by showing that he or she is related to one of the parties. Under the court of appeals' reasoning, all this would have to change. For example, since motherhood is not a crime, it would seem to follow that a jury could not be permitted to learn that the sincere and convincing witness who testified for the defense was in fact the defendant's mother.

The court of appeals' pivotal pronouncement that "membership, without more, has no probative value" is equally wrong. In a trial for murder resulting from a rifle shot fired at long range, would the defendant's membership in a rifle club have "no probative value?" In a trial for counterfeiting, would membership in a printer's union be irrelevant? Proof of membership alone might not be conclusive, but it would surely be relevant, *i.e.*, "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Fed. R. Evid. 401).

The court of appeals suggested (App., *infra*, 6a) that its decision was necessary to protect Mills's freedom of association. However, even if membership in a prison gang were protected by the First Amendment (see *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 125-133 (1977)), the effect upon First Amendment interests in the present case was surely no greater than when a witness is impeached by proof of family relationship. If First Amendment associational rights are not abridged by proof that a witness is married to the

party for whom he or she testifies, we fail to see how Mills's or respondent's First Amendment rights were violated in this case by proof that they belonged to the Aryan Brotherhood.

As Judge Kennedy pointed out in dissent (App., *infra*, 8a), if Mills had been a prosecution witness (for example, in a case brought against a member of a rival prison gang charged with having assaulted respondent), it would almost certainly have been error to preclude the defense from showing that Mills and respondent belonged to a group whose members are expected to commit perjury for each other. See *Davis* v. *Alaska*, 415 U.S. at 316-317. There is no reason why defense witnesses should be treated any differently. If, for example, both sides in a criminal trial called members of gangs with tenets similar to the Aryan Brotherhood's (a realistic possibility in light of the proliferation of antagonistic prison gangs), it would be a travesty if the defense could attack the credibility of prosecution witnesses by proving their group membership while the government was barred from introducing similar evidence regarding the defense witnesses.

In part, the court of appeals appears to have objected to proof of Mills's membership in the Aryan Brotherhood because that evidence was *too probative* regarding his credibility. The court wrote (App., *infra*, 6a):

> Ehle's testimony was not simply a matter of showing that Abel's and Mills' membership in the same organization might "cause [Mills], consciously or otherwise, to color his testimony." *See* dissent at [App., *infra*, 8a]. Rather it was to show as well that because Mills and Abel were members of a gang whose members "will lie to protect the members," Mills must be lying on the stand.

This reasoning is especially faulty. Although members of fraternal organizations, country clubs, alumni associations, professional groups, and most other organizations are not sworn to lie for each other, evidence

of membership in such organizations is admissible to show bias because the trier of fact is permitted to infer that the witness's testimony may be slanted in favor of a fellow member. In this case, the trier of fact was not called upon to infer from simple shared membership in a prison gang that Mills may have slanted his testimony to protect a fellow member. Rather, that evidence bearing quite rationally on Mills's credibility was reinforced by direct evidence showing essentially what the trier of fact would have been permitted to infer from the bare fact that Mills and respondent both belonged to the same group.

The court of appeals' decision, insofar as it appears to turn on the higher probative value of evidence of preagreement to commit perjury, leaves an irrational hole in the permitted methods of establishing a witness's bias. Presumably the court would have allowed the admission of evidence showing that Mills himself had expressed an intent to lie to protect respondent or other members of the Aryan Brotherhood, and the court distinguished the present case from those in which mere group membership is shown and the trier of fact is left to infer that the witness might slant his testimony in favor of a fellow member. If bias may properly be shown in these ways, we fail to see why it may not be established by the evidence introduced in this case.

3. As previously noted, while evidence of bias is always relevant, trial judges have discretion to exclude such proof if its probative value is "substantially outweighed by the chance of unfair prejudice, confusion of the issues, or misleading the jury * * *." Fed. R. Evid. 403; see also Fed. R. Evid. 611. In this way, any unfairness to the defendant may be prevented.

In the present case, the district court carefully balanced the relevant factors and decided not to exclude the proof. The court did, however, prohibit mention of the Aryan Brotherhood's name and offered to give a

limiting instruction. As Judge Kennedy concluded in dissent (App., *infra*, 10a), the district court's rulings were well within its discretion.

4. The court of appeals decision conflicts with *United States* v. *Bufalino*, 683 F.2d 639, 646-647 (2d Cir. 1982). The defendant in that case was charged with attempting to arrange for the murder of a witness against him. The government's theory was that the defendant could prevail upon a fellow prisoner to commit the murder because "both were members of La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy" (683 F.2d at 647). On direct examination, the defendant claimed that his acquaintance with the other prisoner was based on "chance meetings" (*ibid.*). The court of appeals held (*ibid.*) that it therefore "became proper for the government to impeach him by introducing evidence of [his] longstanding relationship with La Cosa Nostra" (*ibid.*). Similarly, in the present case, when Mills denied belonging to a secret prison organization whose members are sworn to lie on each other's behalf, it became proper to impeach him by introducing evidence of his membership in such a group.

The court of appeals' decision in this case also is inconsistent with the Eleventh Circuit's reasoning in *United States* v. *Mills*, 704 F.2d 1553 (1983), petition for cert. pending, No. 83-5286, another case involving the Aryan Brotherhood. In *Mills* the defendant[6] was charged with murdering a fellow prison inmate. The prosecution's theory was that the murder was the re-

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[6] The defendant in *Mills* is not the same person who testified for respondent in this case. However, Robert Eugene Mills, the defense witness in the present case, is a respondent in *United States* v. *Gouveia*, cert. granted, No. 83-128, (Oct. 17, 1983. Testimony regarding Abel's membership in the Aryan Brotherhood was adduced in that trial. See 4 Tr. 562-564, filed in *United States* v. *Mills*, No. CR-80-0278-WPG (C.D. Cal. Jan. 12, 1982).

sult of a "contract" put out by the Aryan Brotherhood to avenge cheating in a drug transaction. Upholding the admission of testimony on the organization, history, and activities of the Aryan Brotherhood, the court wrote (704 F.2d at 1559):

> To make the crime comprehensible to a jury it was necessary for the government to show how the Aryan Brotherhood functioned, that Mills was a member of the Aryan Brotherhood, that an affront to a fellow member might serve as an adequate motivation for Mills to kill a person whom he barely knew, and that it was possible for a member of the Brotherhood incarcerated in one federal prison to communicate the murder contract to another member in a different prison, despite mail censorship and restrictions on inter-inmate correspondence.

The court also upheld the admission of testimony of government witnesses concerning "their intense, deathly fear of the Aryan Brotherhood" (*id.* at 1560). The court found that this testimony was properly admitted to counter defense efforts "to impeach the credibility of the government witnesses by proving that they had agreed to testify falsely for the government to manipulate their way into the 'country club' conditions of the Witness Protection Program" (*ibid.*).

Mills concededly did not involve the admission of evidence of group membership to show bias on the part of a witness. Instead, proof that the defendant belonged to the Aryan Brotherhood, as well as evidence of that group's organization, history and activities, was admitted to show motive and opportunity and for other accepted purposes. But if proof of group membership may be admitted for these purposes without abridging associational rights, we fail to see why it may not also be admitted to show bias in accordance with long-established principles of the law of evidence. It therefore seems most unlikely that respondent's conviction would have been reversed by the *Mills* court, which

upheld the admission of voluminous evidence regarding the Aryan Brotherhood—evidence with far more inflammatory potential than that in the present case.

5. The decision below may significantly hamper the government's efforts to combat organized criminal activity. Prison gangs like the Aryan Brotherhood are responsible for an increasing volume of crimes committed both within and outside prisons. These and other tightly-knit, disciplined, criminal groups pose a serious public danger and present particularly difficult problems for law enforcement. In cases involving such organizations, proof of group membership is often of great relevance, either to show bias or for other accepted purposes. If the associational rights of group members preclude such proof, as the decision below suggests, prosecution of group members will be rendered far more difficult. Fellow members will be able to lie to protect each other, and the government will be barred from proving group membership or showing that group members are sworn to commit perjury on each other's behalf. Significant danger to the public may result.

In addition, there is nothing about the decision of the court of appeals, when set against the general principles of the law of evidence, that confines its reach to impeachment of defense witnesses. The same principles would equally govern defense efforts to show bias on the part of prosecution witnesses. The court of appeals' decision thus promises to sow great confusion among the lower courts and threatens serious abridgement of defendants' rights as well as those of the prosecution. Prompt correction of the error of the court of appeals is therefore required.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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DECEMBER 1983

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 81-1666

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

JOHN CLYDE ABEL, DEFENDANT-APPELLANT.

Argued and Submitted Oct. 6, 1982

Decided May 20, 1983.

As Amended June 6, 1983.

Appeal from the United States District Court for the Central District of California.

Before KENNEDY, TANG and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

In 1981 defendant John Abel was indicted for armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d). He was convicted by a jury and sentenced to a term of twenty-five years. He appeals the conviction on three grounds: first, that the district court improperly denied his motion to suppress evidence seized at the time of his arrest; second, that the court impaired his ability to present witnesses; and third, that the court improperly allowed the introduction of inflammatory references to a secret prison organization for purposes of impeachment. Because we agree that the district court abused its discretion in allowing the inflammatory secret prison organization references, we reverse the conviction and remand to the district court for a new trial.

FACTS

On September 8, 1981, the Bellflower Savings and Loan Association in Bellflower, California was robbed by four white males. A witness gave the FBI the li-

cense number of the getaway vehicle, a white Camaro, which was found to be registered to Anna Sainz.

That same day, several members of the Los Angeles County Sheriff's Office went to Sainz's home and interviewed her there. She informed the officers that she had loaned the car to John Abel that morning. Her housemate Ronald Gremard, Abel and another man left in the Camaro. Abel and Gremard later returned the car to the house and left again in Abel's Ford pickup truck; she expected both of them to return that evening. With Sainz's permission, the officers searched the house, finding a bank bag in one of the bedrooms. Several officers then waited inside the home, while others were stationed outside.

When Gremard and Abel arrived at the house in a Ford pickup, it was dark. Gremard entered the residence and was arrested there. Abel followed more slowly, putting on a shirt while walking toward the house. He was arrested before reaching the unlighted porch. The officers then seized some clothing from the seat of the pickup. Abel was taken to the police substation and searched there. The search revealed $434.50, including a bait bill from the Bellflower Savings and Loan, and eight silver dollars alleged to have been taken in the robbery.

Abel, Gremard, and Kurt Edward Ehle were indicted for the robbery. Gremard and Ehle both pled guilty, but Abel went to trial. Ehle agreed to testify for the government as part of his plea bargain, and did so. Defendant Abel was convicted and this appeal ensued.

I. DEFENDANT'S MOTION TO SUPPRESS

Abel assigns as error the trial court's denial of his motion to suppress the money, including a "bait bill," seized from his person after his arrest. The trial court found that probable cause existed for Abel's arrest and that the search of his pockets was lawful as incident to that arrest. We agree.

At the time that Abel alighted from the pickup truck and began walking toward Anna Sainz's front door, the officers had already interviewed Sainz and searched the residence. Sainz had told them that Gremard and Abel had returned to her house earlier in the getaway vehicle. At that time Gremard had left behind a flannel shirt which the officers found in an upstairs bedroom, wrapped around a white bank bag containing $149.95 in dimes, quarters and half dollars. Abel and Gremard had then left in Abel's Ford pickup, and Sainz expected them to return that evening to take her to dinner. Under these circumstances, the officers had probable cause to believe that the two men who drove up to Sainz's residence, in a truck matching her description, at the time she expected them to come had committed a felony earlier that day. *See United States v. Bernard*, 623 F.2d 551, 558-59 (9th Cir.1980), *quoting Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). The combination of poor lighting and the fact that Abel's face was obscured by the shirt he was donning may have made it impossible for the officers to visually identify him. However, they had sufficient cause to arrest him regardless.

Because Abel's arrest was valid, a search of his person was authorized. "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 39 L.Ed.2d 427 (1973). The search of Abel's pockets and wallet at the station was likewise valid. *See United States v. Ziller*, 623 F.2d 562, 563 (9th Cir.1980). The court therefore did not err in denying Abel's motion to suppress the evidence found in that search.[1]

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[1] Abel also moved to suppress the blue plaid shirt taken from his pickup truck. The trial court allowed the shirt into evidence on alternate grounds of search incident to arrest or "plain

II. EXCLUSION OF TESTIMONY

As required by Fed.Rule of Crim.Proc. 12.1(a), Abel gave written notice of his intention to offer an alibi defense, which included his intention to call his employer Vito Spillone as an alibi witness. No other alibi witnesses were listed.

At trial, Abel sought to have the company bookkeeper, Linda Taylor, testify with regard to the business telephone records of Angie's Wholesale. The district court refused to allow Taylor to testify, ruling that since she was an alibi witness, prior notice to the government was required. Fed.R.Crim.P. 12.1(a).

Because we reverse the conviction on the ground of improper impeachment, we need not decide this issue. At the new trial, the government now has notice of the witness and the issue will not arise again.

III. IMPEACHMENT BY ASSOCIATION

Kurt Ehle testified for the government that Abel had been one of the bank robbers. The defense called Robert Mills to impeach Ehle. Mills had been in prison with Ehle and Abel and had been friendly with both of them at various times. Mills testified that Ehle had told him that Abel was not in fact one of the robbers, but that he (Ehle) intended to identify him as such in order to obtain a shorter sentence for himself. The prosecution was permitted to cross-examine Mills on his alleged membership in a "secret type of prison organization" whose members would "lie to protect the [other] members." Mills denied membership in, or knowledge of, such an organization.[2]

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view." Abel has not specifically attacked this ruling as it applies to the shirt. Because we find that probable cause existed for Abel's arrest, a contemporaneous search of the passenger compartment of the truck he had recently exited is authorized by *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981).

Abel's final allegation of error is, in essence, that the court allowed defense witness Mills to be impeached by association. We believe it to be a fundamental tenet of our criminal justice system that guilt or innocence, credibility or lack thereof, are personal, and cannot be established by evidence that a person merely belongs to a particular group, whether that group is ethnic, political, religious or social in character, and whether such membership is inherent or a matter of choice. It is settled law that the government may not convict an individual merely for belonging to an organization that advocates illegal activity. *Scales v. United States*, 367 U.S. 203, 219-24, 81 S.Ct. 1469, 1481-83, 6 L.Ed.2d 782 (1959); *Brandenberg v. Ohio*, 395 U.S. 444, 448, 89 S.Ct. 1827, 1830, 23 L.Ed.2d 430 (1969). Rather, the government must show that the individual knows of and personally accepts the tenets of the organization. Neither should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value. It establishes nothing about the individual's own actions, beliefs or veracity.

In this case the prosecutor was permitted to engage in the following colloquy:

> Q: Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?
>
> A: No, I don't.

---

[2] Out of the hearing of the jury, the prosecutor stated his intention to cross-examine Mills on his membership in the "Aryan Brotherhood." Recognizing the possible prejudice associated with the name of the group, the court ruled that no specific references would be permitted, but suggested that the prosecutor refer to it as a "secret prison organization."

Q: Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that members thereof will first of all deny they belong to that secret organization?
A: No, I don't.
Q: And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in the secret organization?
A: I know of no organization like that.

The government then recalled Ehle as a rebuttal witness. Ehle testified that Mills and Abel were both members of a secret prison organization whose members would deny its existence and would "lie, cheat, steal, kill . . ." to protect other members.

A trial court does, of course, have broad discretion to admit or exclude evidence, *United States v. Larios*, 640 F.2d 938, 941 (9th Cir.1981). This discretion does not, however, extend to allowing impeachment by association. If the government had sought to impeach Mills on the ground that he belonged to a fraternal organization, and called a witness to testify that such members believe they should lie to protect other members, the court would not have admitted such testimony; similarly it should not have admitted the evidence here. Ehle's testimony was not simply a matter of showing that Abel's and Mills' membership in the same organization might "cause [Mills], consciously or otherwise, to color his testimony." *See* dissent at 1017. Rather it was to show as well that because Mills and Abel were members of a gang whose members "will lie to protect the members," Mills must be lying on the stand. It is this suggestion of perjury, based purely on a group tenet, without any showing that Mills personally accepted such a tenet, that makes such testimony unacceptable. By allowing Mills' testimony to be impeached purely on

the ground that he belonged to an organization that allegedly advocates perjury, with no evidence that Mills *himself* had ever expressed a willingness to lie, the court committed error.

In this case the error was reversible because Ehle's testimony implicated the defendant also as a member of the alleged organization. Since the defendant had not testified in his own behalf, this testimony was clearly not offered for impeachment purposes and served only to prejudice the defendant, again by mere association. This was reversible error.

Accordingly, we REVERSE and REMAND to the district court for a new trial.

KENNEDY, Circuit Judge, dissenting:

This case announces a rule that is incorrect and most unfortunate. It reverses a conviction because of a question I should have thought relevant and proper in any sensible legal system. The court holds that a jury may not be told that both a witness and the defendant for whom he vouches belong to a prison gang bound by oath to lie on each others' behalf in open court, because, without more, that affiliation is not probative of the witness' credibility.

The line of questioning barred by the majority in this case is akin to inquiry respecting family ties, prior business relations, or the myriad other past or present associations that may cause a witness, consciously or otherwise, to color his testimony. There is consensus that such matters are admissible, as probative on the issue of bias. *See* 3 J. Weinstein & M. Berger, Evidence § 607[03] (1982 & Supp.982); 3A J. Wigmore, Evidence § 949 (J. Chadbourn rev. 1970 & W. Reiser Supp.1982). Even with respect to the sensitive area of religion, the Advisory Committee's notes to the Federal Rules of Evidence make it clear that evidence of membership, if relevant to bias, is admissible. Fed.R.Evid. 610 advisory committee note. Indeed, if the tables were turned and a key prosecution witness were a member of a gang such as the one here, I should think it would be error to reject defense efforts to show bias through gang membership. *See Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974); *see generally* Weinstein, Evidence § 607[03].

I respectfully submit it is a mistake to require that routine bias questions meet the constitutional standards for proof of guilt in a criminal proceeding based on associational activity. The majority announces a sweeping prohibition against attempts to establish bias based upon a witness' membership in any organization or

group, relying solely upon a Smith Act case and a criminal syndicalism case. *Scales v. United States*, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Even assuming *Scales* and its progeny have some relevance to the case before us, and I submit they do not, those cases do not prohibit all inferences from the fact of membership. They stand only for the proposition that membership alone is not sufficient for the imposition of a penalty, an issue not present in this case. The inference that a member of a cultist, disciplined prison gang might tend to color his testimony respecting another member from the same prison is a sensible conclusion of the sort used by men and women in their ordinary affairs, and the trier of fact ought to be able to draw it here.

Elementary evidentiary probes similar to those at issue here do not chill or infringe the constitutional right of free association. The first amendment concerns addressed in *Scales* and alluded to by the majority do not arise in the context of cross-examination of a witness as in this case. The witness who is impeached by membership in a group sworn to perjury is subject to no sanction other than that his testimony may be disbelieved. He may respond to the inquiry by either a confirmation or denial of membership, and his answers can be given appropriate weight by the trier of fact. Counsel for the defendant, moreover, may ask further questions in order to correct any misleading inferences. Any danger that such questioning might mislead the jury or prejudice the defendant may be considered by the trial judge under Fed.R.Evid. 403, which is addressed to precisely such matters.

It was proper for the Government to call Ehle to rebut Mills' denial of membership in the prison gang. With the exception of prior criminal convictions, extrinsic evidence of specific instances of conduct ordinarily

may not be introduced to attack or support a witness' credibility. Fed.R.Evid. 608(b); *United States v. Wood*, 550 F.2d 435, 441 (9th Cir.1976). Ehle's testimony in this case, however, goes not to Mills' general character for truthfulness or lack thereof, but to his particular bias or motive for testifying as he did. The bias or interest of an important witness is not collateral or irrelevant, and it is well-settled that extrinsic evidence is admissible, in the trial court's discretion, on that issue. *Barnard v. United States*, 342 F.2d 309, 317 (9th Cir.), *cert. denied*, 382 U.S. 948, 98 S.Ct. 403, 15 L.Ed.2d 356 (1965); *United States v. James*, 609 F.2d 36, 46 (2d Cir.1979), *cert. denied*, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980); 3 J. Weinstein & M. Berger, Evidence § 607[03] (1982 & Supp.1982).

Of coure, Ehle's rebuttal testimony also suggested that Abel himself belonged to the secret prison organization, which was prejudicial to him. Before allowing that testimony, the district court gave the matter particularly careful consideration, and dutifully performed on the record the required balancing of probative value and prejudicial effect. We accord such determinations of admissibility considerable deference on appeal, and will reverse them only for an abuse of discretion. *United States v. Palmer*, 691 F.2d 921, 923 (9th Cir.1982). There is nothing in the record of this case to suggest that the district court abused its discretion or that its determination should be overturned. To the contrary, the district court's consideration of the matter was thorough, deliberate, and well-reasoned. The Government's inquiry into Mills' connection to the secret prison organization and Ehle's rebuttal testimony were entirely permissible.

I would affirm the conviction.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-1666
DC No. CR 81-880-MML

[Sept. 7, 1983]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOHN CLYDE ABEL, DEFENDANT-APPELLANT.

ORDER

Before: KENNEDY, TANG and FERGUSON, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

ORIGINAL

ORIGINAL

No. 83-935

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN CLYDE ABEL, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION

TO PETITION FOR A WRIT

OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, JOHN CLYDE ABEL, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit's opinion in this case. That opinion is reported at United States v. Abel, 707 F.2d 1013 (9th Cir. 1983).

I.
QUESTION PRESENTED

WHETHER A WITNESS MAY PROPERLY BE IMPEACHED BY SHOWING THAT HE AND THE PARTY FOR WHOM HE TESTIFIES BELONGED TO A GROUP WHOSE MEMBERS ARE SWORN TO COMMIT PERJURY ON EACH OTHER'S BEHALF.

II.
STATEMENT OF THE CASE

Respondent, JOHN CLYDE ABEL, was convicted on a one count indictment of armed bank robbery in violation of Title 18 U.S.C. § 2113(a)(d). Following a jury trial in the United States District Court for the Central District of California, respondent received a twenty-five (25) year sentence. The Court of Appeals reversed his conviction.

The factual background of the case as presented by the government is not disputed.

* * *

III.
REASONS FOR DENYING THE WRIT

In its petition, the government argues four reasons for the granting of the petition. Since none of these reasons are persuasive, the writ should be denied.

1. The government's first point appears to be that the Ninth Circuit's evidentiary decision does not find support in the law. From the generally accepted principle that a witness' bias in favor of a party is always relevant evidence, the governen makes a broad leap and concludes that "any evidence from which partiality may be inferred--including common membership in a group--is important in assessing a witness' credibility." (Petitioner's brief at p.9) The government cites no authority for this broad proposition. Its reference to several commentators of evidence to support this proposition is misplaced. These commentators observe only that a witness' bias may be explored by examining the witness' relationship to the party. The Ninth Circuit's opinion does not disturb this evidentiary principle. That Court held only that evidence of group membership of a witness is not probative of the witness' credibility or veracity. This evidence is even more objectionable, that Court reasoned, when it raises the spectre of perjury without proof that the witness is committed to a group tenet which encourages perjury. The Ninth Circuit's conclusion that this evidence prejudiced the respondent should not be reviewed by this Court.

The government's petition to review the judgment of the Court of Appeals ignores a long standing principle that this Court will not grant a writ of certiorari to review an

evidentiary decision or to discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925) The only exception appears to apply in cases which are of significant importance for other reasons. Thus, this Court has specifically granted certiorari to review evidentiary decisions in cases dealing with important constitutional rights of criminal defendants. See e.g., Chambers v. Florida, 309 U.S. 227 (1940)(use of involuntary confessions); Williams v. Kaiser, 323 U.S. 471 (1945) (requirement of counsel in criminal cases).

The case at bar does not involve constitutional issues nor is it expected to have a wide range impact on evidentiary law. The decision of the Ninth Circuit is narrowly written and is limited to the factual posture of this case.

2. The government's second argument appears to be that the Ninth Circuit either misapplied the law or confused current law. The confusion, however, rests with the government's assertion that the Court of Appeals' reasoning would not allow evidence bearing upon credibility unless it was sufficient to prove a criminal offense (Petitioner's brief at p.9.) Simply stated, this is not the holding of the Court's opinion. Accordingly, the government's exaggerated claims that the law of evidence has been revolutionized are unfounded.

Further, the government has again argued, without citing any authority, that group membership may be proved where relevant to show bias. Respondent agrees that the government had a right to show that Mills might have been biased in favor of ABEL and he was cross-examined extensively in this regard. The prosecutor elicited from

the witness that he and respondent were friends and that they had served time together at the Lompoc Federal Prison. Clearly, the government could have argued to the jury that this long-standing friendship motivated the witness to lie on ABEL's behalf. However, the government was not content with this valuable impeachment evidence. Rather, it sought the extremely prejudicial evidence which properly resulted in reversal.

The government argues that the Ninth Circuit Court of Appeals reasoning would result in tremendous evidentiary problems. The government states that under the Ninth Circuit ruling, a jury would not be permitted to learn "that the sincere and convincing witness who testified for the defense was in fact the respondent's mother." These arguments are exaggerated and plainly disingenuous. The Solicitor General discusses several evidentiary problems which might arise under the ruling. It states that in a trial for murder resulting from a rifle shot fired at long range, the defendant's membership in a rifle club would not be admissible. In a trial for counterfeiting, the membership of the defendant in a printer's union would not be admissible. Respondent agrees that such evidence would not be admissible if it was not probative beyond the mere fact of membership. Such evidence is certainly admissible to show a person's ability or opportunity to commit the crime. However, it would not be admissible to prove character. It is a fundamental principle of evidence that a person cannot be convicted on the basis of his character.

A more proper example of the Court's ruling would be exemplified in a case where a Klu Klux Klansman is charged with the homicide of black man. Would the defendant's membership in the Klu Klux Klan be admissible evidence?

Clearly such evidence should be barred because of the great danger that a jury would convict the defendant due to his association with the Klu Klux Klan. However, this evidence would be admissible under the Ninth Circuit Court's ruling, if the defendant had espoused the beliefs of the Klu Klux Klan, and such beliefs were probative of the defendant's commission of the crime.

3. The government does not set out any substantive argument at paragraph 3 at page 12. Rather, the government contends that the district court judge carefully balanced the relevant factors and decided to allow the evidence. The Ninth Circuit's judgment is that the district court did not strike the proper balance and that the respondent was prejudiced as a result. This judgment should not be reviewed.

4. At paragraph 4 on page 13, the government urges the Supreme Court to accept this case to resolve conflicts in lower courts. Specifically, the Solicitor General makes reference to two cases, United States v. Bufalino, 683 F.2d 639, 646-47 (2nd Cir. 1982) and United States v. Mills, 704 F.2d 1553 (11th Cir. 1983), Pet. for Cert. pending no. 83-5286.

The government's contention that the decision by the Ninth Circuit Court of Appeals is in conflict with these two decisions in the second and eleventh circuits is without merit. In United States v. Abel, 707 F.2d 1013 (9th Cir. 1983), the Court was confronted with a problem distinctly different from that presented in Bufalino and Mills. Thus, what is allegedly a conflicting decision is easily distinguishable on its facts. In Abel, the Respondent was being prosecuted for an alleged bank robbery. Kurt Ehle,

one of the co-defendants, agreed to testify for the government against Abel. During the trial, Mills testified that Ehle had confided that he intended to testify falsely against Abel. Over defense counsel's objections, Mills was cross-examined regarding his membership in a secret prison organization which required its members to lie to protect the other members of the organization.

In Bufalino defendant was charged with attempting to arrange the murder of a witness against him. The government's theory was that defendant had prevailed upon James Fratianno to have the witness killed. On direct examination, the defendant said that his acquaintance with Fratianno was based on "chance meetings." Consequently, the Second Circuit found that it was proper for the government to cross-examine the defendant about his friendship with members of La Cosa Nostra and about his presence at Apalachin on November 14, 1957. (Apalachin was a reputed gangland convention). In holding that the cross-examination was proper given the facts, the Second Circuit recognized that "the line of interrogation poses the danger of allowing the jury to find Bufalino guilty by virtue of his association with known gangsters . . . ." 683 F.2d at 647. Nevertheless, the circuit court found the cross-examination proper because without the evidence it was unlikely that the jury would believe that Fratianno would agree to commit the crime. Id. at 647. Thus, in Bufalino, the purpose of introducing membership or references to La Cosa Nostra was not to show that the defendant was a mobster. Rather, the issue of such membership became an intergal part of the government's proof and necessary to link the defendant with the "hit-man"--James Fratianno.

In the Abel case, the prosecutor's motive in introducing evidence about membership in the "secret prison organization" was to show that the witness must be lying. This evidence was in no way related to the government's proof of the charged crime--bank robbery.

Mills involved a contract murder conspiracy which was an aspect of the broader Aryan Brotherhood conspiracy to control drug traffic. Mills complained of the admission of testimony on the organization, history and activities of the Aryan Brotherhood. The Eleventh Circuit found that the testimony was intrinsic to the crime charged. "To make the crime comprehensible to a jury it was necessary for the government to show how the Aryan Brotherhood functioned, that Mills was a member of the Aryan Brotherhood, that an affront to a fellow member might serve as an adequate motivation for Mills to kill a person whom he barely knew, and that it was possible for a member of the Brotherhood incarcerated in one federal prison to communicate the murder contract to another member in a different prison, despite mail censorship and restrictions on inter-inmate correspondence." 704 F.2d at 1559. Again evidence of membership in the Aryan Brotherhood became an integral and natural part of the government's account of the crime.

In Abel there were no allegations by the government that the Aryan Brotherhood had ordered the bank robbery or that it was in any way involved in the crime. Thus, any references to the "secret prison organization" were improper.

It is of note that the government concedes that Mills did not involve evidence of group membership to show bias. (Petition at page 14) This concession supports a conclusion that there is no conflict among the circuits.

5. The last argument in support of its petition for certiorari is that the decision of the Ninth Circuit may significantly hamper the government's efforts to combat organized criminal activity especially involving prison gangs. This argument appears to be highly inappropriate. In the guise of protection of the public, the government suggests that a person's constitutional rights should be trampled. The holding of the Abel case is sufficiently limited so that it will not have the revolutionary impact envisioned by the government. However even if it did have the impact of, "hampering the government's efforts to combat organized criminal activity", this should not be a consideration by this Court. A criminal defendant has a constitutional right to a fundamentally fair trial. After Chambers v. Florida, 309 U.S. 227, the government could not introduce into evidence a confession that had been obtained by improper means such as prolonged questioning. The government argued in Chambers that "law enforcement methods such as those under review are necessary to uphold our laws." Id. at 240. This Supreme Court found such an argument unpersuasive. This Court stated, "The Constitution proscribes such lawless means irrespective of the end." Id. at 241. A criminal defendant's rights cannot depend on the ease or difficulty of enforcing laws.

Aside from arguing an inappropriate consideration, it is clear that the government is reading too much into the judgment and limited holding of the Abel decision. The Court of Appeals did not hold that "the associational rights of group members " will preclude evidence of group membership. Nor did it hold that in prosecutions of prison gang members for organized crime activities, "the government will be barred from proving group membership or showing that group members are sworn to commit perjury on each other's behalf." (Petitioner's brief at p.15).

The Ninth Circuit's holding is sufficiently succint as to merit repeating here:

> We believe it to be a fundamental tenet of our criminal justice system that guilt or innocence, credibility or lack thereof, are personal, and cannot be established by evidence that a person merely belongs to a particular group, whether that group is ethnic, political, religious or social in character, and whether such membership is inherent or a matter of choice. It is settled law that the government may not convict an individual merely for belonging to an organization that advocates illegal activity. [Cites]
>
> Rather, the government must show that the individual knows of and personally accepts the tenets of the organization. Neither should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value.

This holding requires only that the government be held to a high standard of proof in matters that go only to the credibility of a witness where prejudice to a criminal defendant may be substantial. The government must show not only membership, but that the witness who is a member espouses the tenets of the organization. Without this proof, such evidence alone has no probative value.

IV.

CONCLUSION

In summary, the Petition for a Writ of Certiorari should be denied because the Solicitor General has failed to present adequate grounds which would justify accepting this case for review. The Ninth Circuit relied on Supreme Court opinions to decide the Abel case. The Ninth Circuit relied on Scales v. United States, 367 U.S. 203, 219-24 (1959) and Brandenberg v. Ohio, 395 U.S. 444, 448 (1969). The Solicitor General did not cite any contrary authority. Neither did the Solicitor General cite any conflicting authority in the Ninth Circuit. Further, the authorities cited as conflicting in other circuits are distinguishable. Finally, the issue presented in Abel is not an important federal question, but one where the facts and evidentiary problems are restricted to the case itself. For these reasons, the Petition for a Writ of Certiorari should be denied.

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DATED: February 22, 1984

By _____
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-935

UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN CLYDE ABEL, RESPONDENT

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The respondent, JOHN CLYDE ABEL, by his undersigned counsel, asks leave to file the attached Response In Opposition To A Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis. The Office of the Federal Public Defender by Deputy Federal Public Defender Yolanda Barrera Gomez, was appointed as counsel for Mr. ABEL in the trial court under the Criminal Justice Act, 18 U.S.C. § 3006(A)(d).

* * *

This motion is brought pursuant to Rule 46.1 of the Rules of the Supreme Court of the United States.

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YOLANDA BARRERA GOMEZ
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DATED: February 24, 1984 By _____

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No. 83-935

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN CLYDE ABEL, RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1984, a copy of the Motion for Leave to Proceed in Forma Pauperis and the Response In Opposition To A Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to counsel for the petitioner, the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

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(2)

No. 83-935

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CLYDE ABEL

REPLY MEMORANDUM FOR THE UNITED STATES

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3 pp

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-935

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CLYDE ABEL

REPLY MEMORANDUM FOR THE UNITED STATES

Respondent's Brief in Opposition shows both why the court of appeals' decision is absurd and why review by this Court is needed. Explaining what the decision below will mean, respondent provides the following hypothetical (Br. in Opp. 4-5):

> A more proper example of the Court's ruling would be exemplified in a case where a Klu Klux Klansman is charged with the homicide of black man. Would the defendant's membership in the Klu Klux Klan be admissible evidence? Clearly such evidence should be barred because of the great danger that a jury would convict the defendant due to his association with the Klu Klux Klan. However, this evidence would be admissible under the Ninth Circuit Court's ruling, if the defendant had espoused the beliefs of the Klu Klux Klan, and such beliefs were probative of the defendant's commission of the crime.

We submit, contrary to respondent's contention, that in the above hypothetical, evidence of the defendant's membership in the Klan would be relevant to show motive (Fed. R. Evid. 401) even if the prosecution could not produce

a witness to testify that the defendant had espoused the Klan's beliefs. And if a fellow Klansman testified on the defendant's behalf, we submit that their common membership would be admissible to show that witness's bias.

In addition, as noted in our Petition (at 15), the court of appeals' decision may cause as great injustice to the defense as to the prosecution. To modify respondent's hypothetical, suppose a black defendant were on trial and the witnesses against him were Klansmen. Would impeachment on the basis of the witnesses' membership in the Klan be barred on the ground adduced by the court of appeals that "mere membership • • • without more, has no probative value"? Pet. App. 5a.

Respondent concedes (Br. in Opp. 2) that "a witness' bias may be explored by examining the witness' relationship to the party." Common membership in a group is one such relationship. Contrary to the holding of the court of appeals and respondent's submission, membership in a group—whether the Aryan Brotherhood, the Ku Klux Klan, or a boy scout troop—often has probative value. As respondent's telling hypothetical shows, the decision below, by precluding such proof, has the potential to cause most unjust results. When probative evidence, such as membership in the Klan or Aryan Brotherhood, is held inadmissible and a guilty defendant is acquitted, it will be too late to seek review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MARCH 1984

DOJ-1984-03

No. 83-935

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CLYDE ABEL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 6, 1983
CERTIORARI GRANTED MARCH 19, 1984

52 pp

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*The opinions of the district court and the court of appeals are printed in the appendices to the petition for writ of certiorari and have not been reproduced.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES *v.* JOHN CLYDE ABEL

NO. 81-1666
CR 81-880-MML

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

09/08/81	Defendant arrested (Dkt'd 09/11/81).
09/10/81	Filed magistrate complaint (MAGISTRATE REICHMANN) (Doc: 1) (Dkt'd 09/11/81).
	Defendant's first appearance (Dkt'd 09/11/81).
	Arraignment on magistrate complaint held (DFT ARRN & COMM CUST OF UMS. APPOINTED PD Y. GOMEZ AS CNSL FOR DFT) (MAGISTRATE REICHMANN) (Dkt'd 09/11/81).
	Order surety/cash bail set in the amount of $50,000.00 (W/10% DEP, W/FULL JUSTIFICATION) (MAGISTRATE REICHMANN) (Dkt'd 09/11/81).
	Preliminary examination set for 09/21/81 @ 4:30 PM (P/I ARRN SET FOR 9/28/81 @ 8:30AM) (MAGISTRATE REICHMANN) (Dkt'd 09/11/81).
09/21/81	Filed indictment (MAGISTRATE GEFFEN) (Doc: 2) (Dkt'd 09/22/81).
	Order surety/cash bail set in the amount of $50,000.00 (W/10% DEP, FULLY SECURED, W/INT PSA) (MAGISTRATE GEFFEN) (Dkt'd 09/22/81).
	—FLD CR72 BY AUSA KENDALL (Doc: 3) (Dkt'd 09/22/81).
09/28/81	Arraignment held (Count 1) (DFT ARRN, STATES T/N AS CHGD) (MAGISTRATE KRONENBERG) (Doc: 6) (Dkt'd 10/01/81).
	Order appointing attorney GOMEZ, YOLANDA to represent defendant (FLD

CJA FRM 23) (MAGISTRATE KRONENBERG) (Doc: 6) (Dkt'd 10/01/81).

Defendant appears with counsel (MAGISTRATE KRONENBERG) (Doc: 6) (Dkt'd 10/01/81).

Arraignment held (Count 1) (DFT ARRN & ENT PLEA) (JUDGE LUCAS) (Doc: 7) (Dkt'd 10/01/81).

Defendant enters plea of not guilty (Count 1) (Doc: 7) (Dkt'd 10/01/81)

Trial date set for 10/20/81 (Count 1) (JUDGE LUCAS) (Doc: 7) (Dkt'd 10/01/81).

10/01/81 DEMAND FOR NOTICE ON ALIBI.

10/09/81 Motion to suppress evidence filed (MOT#1) (Count 1) (FLD DFT NOTC & MOT/SUPPRESS UNLAWFULLY SEIZED EVID, P/A DECL OF YOLANDA BARRERA GOMEZ & JOHN CLYDE ABEL. RETRNBL 10-19-81 2PM) (Doc: 10) (Dkt'd 10/13/81).

Motion to suppress evidence hearing set for 10/19/81 (MOT#1) (Doc: 10) (Dkt'd 10/13/81).

10/13/81 —FLD DFT NOTC OF ALIBI (Doc: 12) (Dkt'd 10/14/81).

—FLD DFT X-PARTE APPLIC FOR ORD SHORTENING TIME (HRG SET 10-19-81 2PM) (Doc: 13) (Dkt'd 10/15/81).

10/14/81 Filed trial memorandum (Count 1) (FLD GVT TRL MEMO) (Doc: 14) (Dkt'd 10/15/81).

—FLD GVT DISCLOSURE OF WITNS INFO, FRCrP 12.1(b) (Doc: 15) (Dkt'd 10/15/81).

10/15/81 Defendent Ehle pleads quilty.

10/15/81 Answer to motion to suppress evidence (MOT#1) (FLD GVT RESP TO DFT MOT/SUPPRESS EYEWIT IDENTIFICATION. RETRNBL 10-19-81 2PM) (Doc: 16) (Dkt'd 10/15/81).

Filed memorandum in opposition to motion to suppress evidence (MOT#1) (FLD GVT OPP TO DFT MOT/SUPPRESS EVID. RETRNBL 10-19-81 2PM) (Doc: 17) (Dkt'd 10/15/81).

—FLD DFT PROP VOIR DIRE QUESTIONS (Doc: 19) (Dkt'd 10/16/81) .

10/16/81 Filed government's proposed jury instructions (Count 1) (Doc: 20) (Dkt'd 10/16/81).

Order filed (FLD ORDER THAT MOTION TO SUPPRESS THE I/D OF DFT BE SHORTENED AND BE HEARD 10/19/81 @ 2:00PM) (JUDGE LUCAS) (Doc: 22) (Dkt'd 10/19/81).

Motion to suppress evidence filed (MOT#2) (Count 1) (FLD DFT'S MOTION TO SUPPRESS PRE-TRIAL AND IN-CRT WITNESS I/D OF DFT) (Doc: 21) (Dkt'd 10/19/81).

10/19/81 Filed defendant's proposed jury instructions (Count 1) (Doc: 24) (Dkt'd 10/19/81).

—FLD DFT'S EX PARTE APP FOR ORDER CONTINUING TRIAL DATE, MEMO P/A, DECLARATION OF CNSL. GAVE ORDER TO CRD (Doc: 25) (Dkt'd 10/19/81).

Filed government's proposed jury instructions (Count 1) (Doc: 26) (Dkt'd 10/20/81).

Motion to suppress evidence hearing held (MOT#1) (RE DFT'S MOTIONS TO SUPPRESS EVIDENCE AND FOR CONT. MOTIONS TO SUPPRESS ARE PRESENTED TO THE CRT. GOVT'S WITNESS MELINDA LYERLA IS CALLED, SWORN TESTIFIED. GOVT'S EXHIBIT 16, A PHOTO SPEAD, IS MARKED AND RECVD AS EVIDENCE. DFT MOVES FOR A WITHDRAWAL OF EXHIBIT 16 SO THAT THE EXHIBIT MAY BE USED AT THE TRIAL. THERE IS NO OBJECTION FROM THE DFT AND THE CRT

ORD THAT EXHIBIT 16 BE RETURNED TO THE GOVT) (JUDGE LUCAS) (Doc: 27) (Dkt'd 10/20/81).

Motion to suppress evidence denied (MOT#1) (JUDGE LUCAS) (Doc: 27) (Dkt'd 10/20/81).

Motion to suppress evidence denied (MOT#2) (JUDGE LUCAS) (Doc: 27) (Dkt'd 10/20/81).

Status hearings held (RE: HRG PRELIM PROB REVOC. CRT FINDS DFT IS NOT IN VIOL OF HIS PROB AS PROB HAS NOT YET COMMENCED. CRT ORD PETITION DENIED AND FURTHER ORD DFT'S PROB PERIOD TO COMMENCE ON THIS DATE. CRT ORD PROB OFFICER TO REPORT EVERY 60 DAYS FOR THE FIRST YEAR OF DFT'S PROB AND THEREAFTER AS DIRECTED BY THE CRT) (JUDGE BYRNE) (Doc: 40) (Dkt'd 10/20/81).

10/20/81 Order writ of habeas corpus ad testificandum to issue returnable 10/20/81 @ 9:30 AM (FOR WITNESS ROBERT MILLS, DETAINED IN FCI, TERMINAL ISLAND) (JUDGE LUCAS) (Doc: 41) (Dkt'd 10/20/81).

Issued writ of habeas corpus ad testificandum (Dkt'd 10/20/81).

Voir dire begins-jury (Count 1) (JURY IMPANELED) (JUDGE LUCAS) (Doc: 43) (Dkt'd 10/21/81).

Trial begins-juy (Count 1) (JUDGE LUCAS) (Doc: 43) (Dkt'd 10/21/81).

Trial held-jury (Count 1) (J/T 1ST DAY. JURY IMPANELLED) (JUDGE LUCAS) (Doc: 4) (Dkt'd 10/21/81).

Jry trial continued to 10/21/81 @ 9:30 AM (FOR 2ND DAY OF J/T) (JUDGE LUCAS) (Doc: 43) (Dkt'd 10/21/81).

10/20/81 Defendant Gremard pleads guilty.

10/21/81 Trial held-jury (Cont 1) (J/T 2ND DAY. SWORE WITNESSES & MRKD EXHIBITS) (JUDGE LUCAS) (Doc: 44) (Dkt'd 10/27/81).

Jury trial continued to 10/22/81 @ 9:30 AM (FOR 3RD DAY OF J/T) (JUDGE LUCAS) (Doc: 44) (Dkt'd 10/27/81).

10/22/81 Trial held-jury (Count 1) (J/T 3RD DAY. CRT APPOINTS PANEL ATTY EDWIN SAUL TO PRESENT DEFENSE WIT VITO SPILLONE. O/S PRES OF JURY-CRT AND CNSL CONFER RE JURY INSTRUCTIONS) (JUDGE LUCAS) (Doc: 45) (Dkt'd 10/27/81).

Jury trial continued to 10/23/81 @ 9:00 AM (FOR 4TH DAY OF J/T) (JUDGE LUCAS) (Doc: 45) (Dkt'd 10/27/81).

10/23/81 —FLD LIST OF EXHIBITS AND WITNESSES (Doc: 46) (Dkt'd 10/27/81).

Trial held-jury (Count 1) (J/T 4TH DAY. JURY RETURN W/VERDICT. JUDGE WATERS PRESIDING FOR JUDGE LUCAS) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).

Trial ends-jury (Count 1) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).

Jury verdict of guilty (Count 1) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).

Order cause referred to the probation department for a presentence investigation (Count 1) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).

Sentencing set for 11/16/81 @ 2:00 PM (Count 1) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).

—FLD JURY NOTE #1 (Doc: 47) (Dkt'd 10/27/81).

—FLD VERDICT LIST (Doc: 48) (Dkt'd 10/27/81).

11/16/81 Sentencing of defendant (Count 1) (COMM CUST A/G FOR 25 YRS UNDER 18:4205(A) AND THIS SENT TO RUN CONSEC TO SENT IMPOSED IN E/D OF CALIF) (JUDGE LUCAS) (Dkt'd 11/17/81).

Issued judgment and commitment to U.S. Marshal (Count 1) (JUDGE LUCAS) (Doc: 50) (Dkt'd 11/17/81).

Filed notice of appeal (Count 1) (APPL#1) (FLD DFT'S NOTICE OF APPEAL FROM FINAL JUDGMENT ENTERED IN THIS PROCEEDGS ON 11/16/81) (Doc: 51) (Dkt'd 11/17/81).

11/20/81 Filed stipulation between the government and defendant (FLD GOVT'S STIP RE: RETURN OF EXHIBITS) (Doc: 52) (Dkt'd 11/23/81).

Order filed (FLD ORD RE RETURN OF EXHIBITS STATED ON PLEADING)(JUDGE LUCAS) (Doc: 52) (Dkt'd 11/23/81).

11/23/81 —(APPL#1) (FLD NTC TO APPEAR BF A MAGISTRATE. RETNB 12/2/81 @ 9:05AM BF MAG TASSOPULOS) (Doc: 54) (Dkt'd 11/24/81).

12/02/81 —(APPL#1) (FLD TRNSCRIPT DESIG AND ORD FORM FROM USCA, 9TH CIRCUIT) (Doc: 56) (Dkt'd 12/03/81).

—(APPL#1) (FLD TRNSCRIPT DESIG AND ORD FORM) (Doc: 57) (Dkt'd 12/03/81).

12/03/81 Filed stipulation between the government and defendant (FLD STIP RE: RETURN OF EXHIBITS, RELEASED TO CUST OF AGENT LYERLA, FBI) (Doc: 58) (Dkt'd 12/03/81).

Order filed (FLD ORDER RETURNING EXHIBT 2 TO THE CUST OF AGENT LYERLA, FBI) (JUDGE LUCAS) (Doc: 58) (Dkt'd 12/03/81).

12/17/81 —(APPL#1) (LODGED T/C OF ORD FOR TI SCHED RE APPEAL, CRT REPRTERS TRANSCRIPT WILL BE FILD IN DIST CRT 12/30/81, OPEN BRIEF FO [SIC] APPELLANT & APPELANTS DESIGN OF CLERKS RECORD ON APPEAL 2/10/82, APELLEES DESIGN OF CLERKS RECRD ON APPEAL 2/24/82, BRIEF OF APPELLEE 3/17/82,, REPLY BRIEF OF APPELLANT 3/31/82.) (MAGISTRATE TASSOPULOS) (Doc: 61) (Dkt'd 12/29/81).

03/18/82 —(APPL#1) (FLD ORIG RPTR'S TRANSCRPT OF PROC HAD ON 10-19-81, 10-20-81 (VOL 1), 10-21-81 (VOL 2), 10-22-81 (VOL 3), 10-23-81 (VOL 4).) (Dkt'd 03/19/82).

[156] Excerpt of the Trial Transcript, October 21, 1981.

(The following proceedings were had between the Court and counsel in chambers:)

THE COURT: Let the record reflect that in United States versus Abel, we are proceeding in chambers, outside the presence of the jury and the defendant, at the request of defense counsel.* * * * *

[158] * * * * *

MR. MAC INTYRE: Your Honor, there's one matter I think I should bring up right now. It could be troublesome. Miss Gomez has asked that Mr. Mills be brought over as a witness to testify for Mr. Abel. Mr. Mills is the defendant in a murder case in front of Judge Gray. That's the case that was reversed by the Ninth Circuit. Judge Gray's orders were reversed in regard to dismissal of the indictment. I don't know all the facts of the case.

THE COURT: That was a Lompoc murder case, and it was a question of denial of constitutional rights by being placed in "the hole," allegedly without access to counsel. I know the case, yes.

MR. MAC INTYRE: All right. At some time following Mr. Ehle's arrest on September 10th, he was put [159] in a cell with Mr. Mills. Mr. Ehle and Mr. Mills, and allegedly Mr. Abel, are all members of the Aryan Brotherhood, or Brand. One of the reasons why the bank robbery was committed in this case, allegedly, according to Mr. Ehle's statement, is that Abel and the other parties involved in it were in debt to loan sharking activities in connection with the Aryan Brotherhood. I don't see how it's possible to keep the term "Aryan Brotherhood" or "loan sharking" out of this case if Mr. Mills testifies, because it would really preclude me from an effective cross-examination of Mr. Mills; the reason being that not only will it prevent me from cross-examining as to his—obviously, I don't know what he's going to be testifying to. There's been no proffer of what Mr. Mills' testimony is going to be. I've talked to Mr. Ehle this morning about his conversation with Mr. Mills. I know generally the gist of it from what Mr. Ehle tells me. I

wasn't there. And I don't see how I can keep out the term "Aryan Brotherhood." I want to abide by your Honor's previous ruling, but when I put Mr. Ehle on the stand, he is going—I have asked him not to mention from my questions the term "Aryan Brotherhood," and I just found out this morning the term "Brand" also means "Aryan Brotherhood" in some respect. I don't know what. I don't see how he can testify as to the splitting up of the money [160] without using the term "Aryan Brotherhood." Now, he might be able to, but I don't know what kind of cross examination is going to be asked, and the term might come out then. I don't see how it's going to prejudice the case. It's not a term like "Mafia" in the Polizzi case, which was precluded. I don't see the connotation of the term "Aryan Brotherhood" being something like "Mafia" or a venereal disease or something like that. I don't see—

THE COURT: Well, I do think that it is less pejorative than, say, the "Mexican Mafia" or the plain old "Costa Nostra Mafia," I would agree with you on that.

But let's hear from Miss Gomez. What is your thought?

MISS GOMEZ: Your Honor, I feel that the prosecution should have an opportunity to bring out that the reason that the bank robbery was committed is because they needed money that they owed to someone. If that's what Ehle's testimony is, I see nothing wrong with that coming out.

THE COURT: Well, that it's loan sharking, in essence?

MISS GOMEZ: Well, if they just say that they owed money, people owe money all the time. I think once they say they owed money to a loan shark or they owed [161] money to the Aryan Brotherhood, I don't see why it's necessary to bring that out. Ehle can just say that they owed money and they were in debt and needed money, so they decided to go out and rob a bank to pay off these debts. I don't see why it's necessary to bring out "Aryan Brotherhood" or "loan sharking."

THE COURT: As to Mr. Mills' testimony, is it appropriate to consider an offer of proof as to his testimony, to determine whether or not the Aryan Brotherhood is going to be raised by his testimony?

MISS GOMEZ: That would be acceptable as far as the defense is concerned, your Honor.

THE COURT: All right. Do you want to give that now, so you may have an advance ruling on that?

MISS GOMEZ: Certainly. Mr. Mills' testimony would be that—I don't have my notes in front of me, but my recollection is that he would testify that he was in a cell with Kurt Ehle, and Ehle approached him regarding testifying in this case. Ehle told him that he had agreed to cooperate with the Government because this was his ticket out, that he was going to use Abel as his ticket out of this, because he loved his family and wanted to be with his family, and this is the only way that he could do it. He was afraid that his testimony by itself would not be sufficiently credible, and he wanted [162] Mills to be a witness for the Government as well and also make up stories about Abel, so that this would reinforce his testimony. Mills told him to get lost, and Abel left the cell. And that basically would be Mills' testimony.

THE COURT: What is your view as to whether or not that raises the spectre of the Aryan Brotherhood?

MISS GOMEZ: Your Honor, I don't see how it brings up anything relating to the Ayran Brotherhood. There was no mention of that in their conversations, according to what I have been told.

THE COURT: You've heard Mr. MacIntyre represent, apparently, that Mr. Ehle will suggest that he and Mills and Abel were members of the Aryan Brotherhood. Do you have a position one way or the other on that?

MISS GOMEZ: I've asked my client if he knows people in the Aryan Brotherhood. He's indicated he knows people. He denies being a member. I have not asked Mills anything about the Aryan Brotherhood. I have no reason to believe that any of the three people, Ehle, Abel, or Mills, are members of the Aryan Brotherhood. They have never brought it up to me. I have not spoken to Ehle, of course.

THE COURT: I tried relatively recently a case involving the Mexican Mafia at Lompoc—as you know, I'm sure, as we all know who are involved in this type of case [163] —another prison organization, and in that case there was testimony that the Aryan Brotherhood is a very militant

and ruthless, as it were, prison organization. If Mr. Mills or if Mr. Ehle were members of the Aryan Brotherhood, I can conceive, for example, Mr. Ehle making a determination that he was going to concoct whatever he is concocting. It may be appropriate to inquire whether he is doing so lightly or in view of perhaps the ultimate death sentence that will be levied against him by the Aryan Brotherhood. We had testimony in this Lompoc case or indication in this Lompoc case that the leader of the Aryan Brotherhood is back in Marion, and he gives directions to Aryan Brotherhood hit men, as it were, and they dispatch those who don't follow the dictates of the Aryan Brotherhood. I don't know whether it brings it into the necessity of either direct or cross-examination on the subject. What is your thought?

MR. MAC INTYRE: Well, the only thing I know, your Honor, is what Mr. Ehle told me this morning, and according to Mr. Ehle's testimony this morning—he told me this morning in my office in the presence of an agent that Abel had directed the murder of a person at Lompoc which Mills carried out, and Mills and Abel are very close friends, having served time in prison together, and as part of the bond of that relationship, Mills would [164] probably say anything on behalf of Abel. That's about all I know. I asked Ehle if he had discussed—see, Ehle is in the same cell with Abel. Mills is downstairs in the next tier. And while Ehle is cleaning out downstairs, he runs into Mills, and Mills asks Ehle about the bank robbery, and I think the questions asked were: "When were you arrested? Who else was arrested?," along that line, and "Was bait money recovered on Abel?," and something about a license plate on the Camaro, the reason why they got caught is that somebody forgot to tape the paper over the license plate on the Camaro.

THE COURT: This conversation, again, was between whom?

MR. MAC INTYRE: Between Ehle and Mills. And that's all I know.

THE COURT: Well, give me your thoughts, Miss Gomez. Let's assume for the sake of discussion that there is

a relationship betwen Mills and Abel such that Mills allegedly has in the past—

Let me go back for a moment, Mr. MacIntyre. Is it your understanding that Mills has admitted to Ehle that he, Mills, at the direction and insistence of Abel, committed whatever he committed?

MR. MAC INTYRE: No. No. He did not admit this to Ehle. Ehle told me that. I don't know how Ehle got [165] that information, whether he got it from Abel, whether he got it from Mills, whether he got it from another party. I don't know. That's what he told me. Ehle told me that, that Abel directed Mills, who's a very young person—I believe Mills is in his early 20's, isn't he?

MISS GOMEZ: I believe so.

MR. MAC INTYRE: —to commit the murder. That's all I know. I don't know where Ehle got that.

THE COURT: Well, if Ehle got it by a process of osmosis, then it's not going to be usable. If he got it either from Mills, or perhaps arguably from Abel, and it turns out that Mills is, in terms of willingness to accept direction, an automaton as far as Abel is concerned and will lie in this case, then we may have to bring this out.

Do you have any thought on that?

MISS GOMEZ: Your Honor, what Mr. MacIntyre has been talking about is all just conjecture of what could have been. I mean, we can make up stories about Ehle may be out to get Abel because Abel doesn't want to have anything to do with the Aryan Brotherhood or is trying to leave the Aryan Brotherhood. I mean, I've heard that rumor, and I've heard it from some of the witnesses that we've interviewed, that, you know, Abel used to belong [166] to the Aryan Brotherhood, but he doesn't any more, he's been trying to get out, and that Ehle is out to get him. I mean, I just don't feel that I should be permitted to cross-examine on something like that when these are just rumors and speculations of people. And that's what we have with Mills, a speculation by agents, by I don't know whoever it is, that Mills was ordered by Abel to kill this person in Lompoc. There's no proof of that. No one's admitting to that. And because of speculations, a fair trial can be jeopardized by

bringing out the mention of "Aryan Brotherhood." No one has admitted to being a member of the Aryan Brotherhood except Ehle, apparently.

MR. MAC INTYRE: Well, maybe not admitted it, but Ehle will testify that Abel is a member of it. He's known Abel since 19—when he was in prison with Abel. He's met him at Tracy ten years ago, when they served time together for—Abel was convicted of bank robbery, got a 20-year sentence, and served time. And they're very close. He served in prison with him. Vito Spillone, who's the alleged alibi witness, also served in prison with Abel until Vito got out of prison. And Ehle will definitely testify that both he and Abel worked as loan collectors for Vito Spillone, which is another area that we might get into if Vito Spillone testifies.

THE COURT: Now, if Vito Spillone testifies—

[171] * * * * *

[THE COURT]: At any rate, let's go back to the Aryan Brotherhood, Brand, et cetera. At the moment, at least, let's have neither side bring up that aspect of it. It may have to come up, depending upon what direction it goes. [172] For example—and I'd like your view on this, Miss Gomez—If Mr. Ehle were to testify—and I'm gathering this from what Mr. MacIntyre is saying—that he, Abel, and Mills were all members of the Aryan Brotherhood together in prison, and that one of the strongest tenets of the Aryan Brotherhood is that they will lie, cheat, steal, and plunder for each other, irrespective of honor, integrity, and an oath to tell the truth, is that going to be admissible, that Mr. Mills is, in Mr. Ehle's—now, this may be as rebuttal for what Mr. Mills says. Ehle comes back and says, "He's a member of the Aryan Brotherhood. So am I. So is Mr. Abel. We took an oath long ago that we would do anything at all to help each other, and it matters not whether we're under oath or anything else." Would that be admissible as rebuttal by the Government? Again I'm trying to point out the potential of doors being opened. But I don't know the facts in this case. I'd like your thoughts on that before we go a lot further.

MISS GOMEZ: I just can't see that, your Honor, as being admissible, because we are getting back again to the Aryan Brotherhood.

THE COURT: Well, I know we're getting back to it, but the question is whether or not it would be relevant to impeach the credibility of Mills.

[173] MISS GOMEZ: I think if we had some kind of evidence other than Ehle saying that everyone is a member of the Aryan Brotherhood, it would be relevant that they have taken such an oath, and that would go to their credibility on the stand.

THE COURT: Again, I don't know whether they have, but I'm suggesting, if there's something of that ilk lurking in the background.

MISS GOMEZ: I could see that as being relevant if, as I mentioned, there was some way of determining whether all three of them were members.

THE COURT: It would require, in your view, a fourth person, who would say, "Ehle—"

MISS GOMEZ: I believe so, yes.

THE COURT: Why wouldn't Ehle be able to say, "In 1973, at Tracy or wherever, Mills and I and Abel agreed to be members of and were members of the Aryan Brotherhood, and one of the tenets of the Aryan Brotherhood is to support your Aryan brother in a time of need"?

MISS GOMEZ: Well, I think that would certainly be relevant, but I think it just—the probative value I think is outweighed by the prejudice in this case. The term "Aryan Brotherhood," as your Honor indicated, I agree, I don't think it's as bad as the term "Mexican Mafia," but I think it comes very close to it, and I [174] think that the jury is very likely to be swayed if they know anything about the Ayran Brotherhood—and I'm sure most of them have at least heard the term, and it's been connected with murders and it's been connected with drugs and it's been connected with other terrible things—and they will convict my client on the basis that he is a member of the Aryan Brotherhood rather than on the evidence.

THE COURT: Well, at any rate, I'm attempting to together peer through the murk in this case and see what

could be involved. At the moment, however, let's not talk about Aryan Brotherhood, the Brand, anything of that nature, until we've had another side-bar conference and one side or the other agrees or disagrees that the doors have been opened. But I do say to you, Mr. Spillone may open up some very unpleasant doors, and I trust that you're prepared for that likelihood. I don't see that there's a great deal of difference between "Aryan Brotherhood" and "loan sharking," quite frankly, but, again, that's a tactical matter for you to consider, and that's why I've turned these tapes over to you.

* * * * *

[348] (The following proceedings were had between the Court and counsel in chambers:)

THE COURT: Let the record reflect we are proceeding in chambers, outside, of course, the presence of the jury and of the defendant. Counsel are present, and in addition present is—

MR. DIAMOND: Charles P. Diamond representing Robert E. Mills, a witness.

MR. MAC INTYRE: Your Honor, in view of our statements in here this morning wth your Honor in regard to Mr. Mills, my information from Mr. Ehle is as follows: [349] Mr. Ehle—

THE COURT: Let me back up just a minute and make a preface. It's my understanding, Mr. Diamond, that the defense in this case, Miss Gomez on behalf of Mr. Abel, is contemplating calling your client as a witness for the defense, and he will testify—do you want to give us a brief offer of proof, at least, as to what his testimony will be.

MISS GOMEZ: Yes, your Honor. Mr. Mills has indicated that he would testify that a couple of weeks ago, while he was in J-1 at Terminal Island, he was visited by Mr. Ehle; that Mr. Ehle mentioned to him that Abel did not have anything to do with the bank robberies, but that he was going to use him as his ticket and would say anything to go free; that the reason that he was doing this was because he wanted to be with his family; and that Mr. Ehle also approached Mr. Mills to support his story as to that it would be more believable with the Government and that this

would help Mr. Mills by him getting less time for the present case that he is incarcerated for.

THE COURT: All right. And for the record, what is Mr. Mills' status in our criminal-justice system, Mr. Diamond?

MR. DIAMOND: Mr. Mills is currently serving [350] a 15-year sentence for bank robbery, as I understand it. He is also under indictment in this district for a homicide that took place at Lompoc in August of 1979. That matter is scheduled to go to trial before Judge Gray on November 24th of this year. In view of the prospect of Mr. Mills' trial, I am paying particular attention to his participation in this case, and although I perhaps do not have technical standing to raise objections to proposed lines of examination or cross-examination, to the extent that the Court will indulge me, I would like to be heard on those matters.

THE COURT: All right. I take it you have advised him of everything that is to his disadvantage in this matter; the obvious: that if he commits perjury, he is subjecting himself to the possibility of a consecutive additional five years to whatever he is doing now, and all the rest of that?

MR. DIAMOND: I have advised him fully of the implications of testifying in this case.

THE COURT: All right. Now, have you completed your offer of proof, Miss Gomez?

MISS GOMEZ: Yes, your Honor.

THE COURT: Mr. MacIntyre.

MR. MAC INTYRE: Well, once again I see the term "Aryan Brotherhood" or "Brand" looming in the [351] background. It's my understanding, after talking with Mr. Ehle again today, that Ehle, Mills, and Abel are all members of the Aryan Brotherhood, and active members, I might speak. It's also my understanding that Abel was the one that directed Mills to kill the individual at Lompoc. It is also my understanding—and I intend to pursue this matter further by talking with Mr. Ehle either when I get up to my office this afternoon or tomorrow morning or tonight—that as part of the allegiance to the Aryan Brotherhood, one is bound to lie or do anything within his power to aid another member, to the extent of committing perjury or giving a false alibi or making false statements in this case.

I've discussed with Mr. Ehle Miss Gomez's statement, what he allegedly said to Mills, and Mr. Ehle did not make any statements that she has reflected to the Court. But I think that the issue and the reason we're back here is how we're going to handle the relationship of Mills, Ehle, and Abel to the Aryan Brotherhood.

THE COURT: I suppose what you're talking about is whether or not the Government should be allowed on rebuttal to recall Mr. Ehle and have him testify in essence as you have indicated.

MR. MAC INTYRE: Right. that's the guts of it.

[352] THE COURT: What is your thought, Miss Gomez?

MISS GOMEZ: Your Honor, I maintain the same position throughout the discussions that we've had here in chambers regarding reference to Aryan Brotherhood. There is no evidence that any of these people are members of the Aryan Brotherhood—

THE COURT: Isn't that the issue, whether or not we are going to admit evidence? Now, if I understand Mr. MacIntyre's offer of proof, there will be evidence, albeit from Mr. Ehle—and that may be a question of how much weight to be given to it—but there will be evidence that Ehle, Mills, and Abel were all members of the Aryan Brotherhood. Now, should we admit that and whatever else follows from that? That's the issue, I believe.

MISS GOMEZ: Your Honor, if Ehle is going to be permitted to say that—Ehle is saying many people are associated with the Aryan Brotherhood. I mean, from my understanding from speaking to Mr. MacIntyre, he has accused me of being associated with the Aryan Brotherhood. Now, I know that that is certainly a fabrication on his part. If he is accusing me of being associated with the Aryan Brotherhood, I don't see how we can trust—

THE COURT: I can assure you we're not going to put that into evidence or allow that into evidence.

[353] MR. MAC INTYRE: I have assured her of that also.

MISS GOMEZ: It seems to me, though, if Ehle is allowed to take the stand and say these people are members of the Aryan Brotherhood, I certainly have a right to get up there

and say, "Haven't you accused other people of being members of the Aryan Brotherhood? Haven't you accused me?"

MR. MAC INTYRE: I don't think we ought to raise this in front of the jury, because it raises collateral matters we need not go into in front of this jury. As long as Miss Gomez brought the matter up, there was a discussion between her and I where I had related to her what an FBI agent related to me. I consider the matter closed and need not go into it.

Going back to what's relevant, I think that Mr. Ehle's testimony is certainly admissible if he so testifies, if Mills testifies, as to any allegiance there is between members of the Aryan Brotherhood—

THE COURT: I think we must go further in whatever offer of proof you have as to the foundation for this conclusion, that—

MR. MAC INTYRE: I can't make an offer of proof, to be quite candid with your Honor, because I have not had the opportunity fully to explore it with him. [354] I will do so this evening, tonight or tomorrow morning. I just haven't had the opportunity to do it.

THE COURT: All right. Presumptively, it would have to be something more viable than Mr. Ehle saying, "I was standing in the exercise yard, and I looked at a cloud, and I saw it written on a cloud."

MR. MAC INTYRE: Right.

THE COURT: We have to have something substantial to get over Miss Gomez's concern. Now, let's assume for the sake of discussion that there is a sufficient foundation submitted by Mr. Ehle, whatever it may be, of the Aryan Brotherhood, and of his knowledge of the tenets of the Aryan Brotherhood, that is, in a robot, automaton-type fashion, to obey the orders of a superior in that brotherhood. I'm not suggesting that's true. I don't know. But assuming we have a sufficient foundation for that, and that Mills is a member, and Abel therefore could give him such direction. Is that admissible or not, in your view?

MISS GOMEZ: Your Honor, I would have to reiterate the same position that I had earlier today, and that is that that type of information would be so prejudicial that my cli-

ent would be convicted for being a member of the Aryan Brotherhood rather than for any type of evidence that was introduced.

[355] THE COURT: Let me ask you this, then, so that there's no question about the hypothetical question I'm putting to you: Accept as true that they are all members of the Aryan Brotherhood and that an order by Abel to Mills will be followed without question, and I guess to make my point clear, Abel has ordered Mills to testify in this case in his defense as you have given the offer of proof. Would that be admissible?

MISS GOMEZ: I think it would be admissible—I think it would be proper for Mr. MacIntyre to ask Mills, "Isn't it true that Abel has ordered you to give this testimony? Isn't it true that you're lying, that you're doing this to help your friend Abel?" But I certainly do not think it's admissible to say, "Isn't it true you're a member of the Aryan Brotherhood and you're here to protect another member?"

THE COURT: I'm not trying to back you to the wall, but I am trying to get your thinking. Keep in mind my hypothetical. We're accepting it as a given, as a true circumstance. We don't have to worry about credibility or anything else. They're all members of the Aryan Brotherhood, and Abel can and did tell Mills, "Get up and lie for me." You can't mention "Aryan Brotherhood"; you can just say that Abel said, "Get up and lie for me," without mentioning this organization of [356] which they're a member?

MISS GOMEZ: That would be my position, your Honor, yes; that if there was someway that we could prove that they're all members of the Aryan Brotherhood, my position would be that that should not come out, because of the prejudice to my client of being a member of such an organization.

THE COURT: All right. Mr. MacIntyre.

MR. MAC INTYRE: Well, my position would be the opposite. I think that if there is an organization in existence that Mills, Abel, and Ehle are members of which has an allegiance, assuming the proper foundation is laid, whereby Abel could give orders to somebody—and keep in mind—

How old is Mr. Mills?

MR. DIAMOND: 25, I believe.

MR. MAC INTYRE: He's ten years younger than Mr. Abel. I think it's clearly relevant. It defintely [sic] goes to his credibility. And as I say, at this time I probably can't lay the foundation, but I will talk to Ehle.

THE COURT: Mr. Diamond, do you want to be heard?

MR. DIAMOND: I do indeed, your Honor. My concern is not with the Government's rebuttal testimony. [357] That certainly is not a matter that Mr. Mills has any say over.

With respect to cross-examination questions that are directed to Mr. Mills, we have thus far discussed two. One is a possible nexus of Mr. Abel in the homicide which Mr. Mills is accused of. This—

THE COURT: Perhaps we should talk about that, so that counsel can give me an assurance we're not going to be necessarily involved in that. When did that occur?

MR. DIAMOND: Well, as I understand it, to the extent there is any foundation for—

THE COURT: There was a homicide, I take it?

MR. DIAMOND: August 22, 1979.

THE COURT: All right.

MR. DIAMOND: The prison authorities received what is known as a snitch note, a note that was dropped on a counselor's desk by an unknown author, suggesting that Abel was in some undefined fashion behind the murder that was committed. To the best of my recollection, that note did not connect Mr. Mills in with that murder.

The bottom line of what I'm saying is, I don't think there's any sort of good-faith basis which would permit the Government to inquire on cross-examination as to a nexus, and I would have serious reservations about permitting my client to testify or to respond to questions [358] which concern or touch upon matters that he is currently scheduled to be tried on.

THE COURT: He is charged presently with the August 22, 1979, murder at Lompoc; is that correct?

MR. DIAMOND: That is correct.

THE COURT: Are there co-defendants?

MR. DIAMOND: There is one co-defendant.

THE COURT: And who is that?

MR. DIAMOND: An individual by the name of Raymond Richard Pierce.

THE COURT: Is that in any way involved in our litigation?

MISS GOMEZ: No, your Honor.

MR. MAC INTYRE: Not that I know of.

MR. DIAMOND: With respect to the second issue, cross-examination issues concerning my client's membership in the Aryan Brotherhood, I can sympathize with Miss Gomez, but that again is not my primary concern. I have misgivings about such questions being put to Mr. Mills, given the background that Mr. Mac Intyre has laid, and I wonder whether I would not be derelict in advising my client to invoke the Fifth Amendment with respect to such inquiries. It sounds like Mr. MacIntyre is talking about a criminal enterprise, and I think my client would probably be best advised not indicating one [359] way or the other as to any potential affiliation with such an enterprise.

THE COURT: A criminal enterprise? Be more specific.

MR. DIAMOND: It would appear to me that if an organization exists operating under the guidelines as Mr. MacIntyre has outlined them, it is likely that the enterprise is a conspiracy, if to do nothing else, to obstruct justice, if in fact there's a compact betweeen the members or among the members to suborn perjury and to provide perjured testimony. I am very uncomfortable about letting my client testify as to such matters, and again, I think I would be derelict in not suggesting to him that he ought to consider invoking his Fifth Amendment privilege with respect to such inquiries.

Beyond that, I see the general area of exmination, [sic] aside from the foundational problems that seem to exist, being somewhat highly inflammatory. And again, I am not trying this case, and my interest is not in the outcome of this case, but in Mr. Mills being dealt fairly with when he is on the stand.

THE COURT: All right. As an offer of proof, Miss Gomez, was there some relationship or has there been some relationship between Mr. Abel and Mr. Mills previous to September the 8th?

[360] MISS GOMEZ: To my knowledge, no, your Honor. Mr. Mills was asked about that, and his response was that he did not know Abel very well and that the reason that he wanted to testify is because he wants to make Ehle's actions known to the Court. He does not want to see a miscarriage of justice. I have asked my client, Abel, whether he knows Mills, and he has indicated to me the same thing: that he knows who he is, but he does not know him very well.

THE COURT: Did they serve time together in some penal institution, to your knowledge?

MISS GOMEZ: I don't know that. I know that Ehle and Mills served time together. I do not now if Mills and Abel ever served time together.

MR. DIAMOND: They were briefly at Lompoc together I believe a year and a half ago, and I don't know the duration of the period of time, but I'm told it was somewhat short.

THE COURT: Has Mills ever been at Marion do you know?

MR. DIAMOND: Mills was transferred to Marion—I have to think back in my chronology. Shortly after Judge Gray initially dismissed the indictment in Mills' case, which was a year ago, July, he was transferred to Marion.

[361] THE COURT: When were they, meaning Abel and Mills, together in a penal institution, as far as you understand, Mr. Diamond?

MR. DIAMOND: I'm speculating and drawing conclusions, but I believe it would have been in '78 or early '79.

THE COURT: Was this what, Lompoc? Is that what we're talking about?

MR. DIAMOND: Yes.

MR. MAC INTYRE: They were also together at TI from the 9th of September to the 11th. Mills was on the floor below Abel and Ehle. Abel and Ehle were in the same cell. Mills was down below.

THE COURT: And how long were they together, if anyone knows, at Lompoc previously?

MR. MAC INTYRE: I do not know.

THE COURT: It seems to me, at the very least, Miss Gomez, we're running the risk of the fact of your client's prior felony convictions coming out before this jury, if a relationship did exist between Mr. Abel and Mr. Mills at some other time in a prison; again, assuming that it's relevant in this whole milieu.

MISS GOMEZ: Right. Your Honor, I feel that it would be fair that they knew each other from before, that this just isn't Mills all of a sudden heard the name [362] "Abel" and decided to come in and testify, but I don't see why it would be necessary to indicate where they knew each other from.

MR. MAC INTYRE: I disagree with that, your Honor.

THE COURT: Well, let's do this: I want to hear more from Mr. MacIntyre tomorrow about his full offer of proof as to the background and knowledge, that type of thing, and then I'll rule on it tomorrow, after I've heard that.

* * * * *

[365] Excerpt of the Trial Transcript, October 22, 1981.

(The following proceedings were had between the Court and counsel in chambers.)

THE COURT: Let the record reflect we are proceeding in chambers, outside the presence of the jury and the defendant in the case of United States versus Abel.

MR. MAC INTYRE: Darrell MacIntyre representing the Government. Also present is Special Agent William Wiechert of the FBI.

THE COURT: Thank you.

Miss Gomez.

MISS GOMEZ: Yolanda Gomez representing John Clyde Abel. * * * * *

[366] * * * * *

MR. MAC INTYRE: I believe the Court's inquiry to me yesterday was in regard to my offer of proof in regard to Ehle's association in the Aryan Brotherhood with Mills and Abel.

THE COURT: Yes.

MR. MAC INTYRE; I spoke to Mr. Ehle this morning from approximately 10 minutes to 9:00 until approximately

10 after in the presence of Agent Wiechert [367] and another agent. He tells me that the motto of the Aryan Brotherhood is "Blood in, Blood out"; that Mills is a member of the Aryan Brotherhood; that Mills has told him that; that Abel was one of the twelve original founders of the Aryan Brotherhood at San Quentin, with an individual by the name of Jack Mahone, who is dead. The code of the Aryan Brotherhood is to first of all deny that such an organization exists and that one is a member of such organization, and also part of the code is to lie and protect fellow members. It takes a year to get in the Aryan Brotherhood, and, according to Ehle, it's a foregone conclusion that both Abel and Mills are members of it. In fact, Ehle served time with Mills from 1979 to '80 in I believe TI, Terminal Island. He has some pictures of himself with Mills taken in the reception room. He read a letter that Mills wrote to Abel talking about where various members on the Aryan Brotherhood were. He said that the term "Brand" is used by the members of the Aryan Brotherhood because when it was first started, they would put a cloverleaf and a "B" on their chest, but when it got widely known that one was a member, they attempted to disguise the tatoos, and he has done so himself, and also so has Abel.

He said that Abel directed Mills to kill someone at Lompoc, and that's what Mills is presently being [368] held on. That basically—just a moment.

(Brief pause.)

In order to get into the Aryan Brotherhood, you have to either kill somebody at the direction of the ones that are in charge of it or be a participant or part of the actual killing to get in the brotherhood. And Ehle estimates that there are approximately a hundred members in the state system of California and approximately three hundred members in the federal system, and that when you are transferred from one institution to another, you contact a member, and he tells you who to get in touch with at the institution which you're going to; that being a member of the Aryan Brotherhood.

I think that's—

THE COURT: Let's talk about Mr. Abel's relationship with Mr. Ehle in the past in terms—

MR. MAC INTYRE: All right. Mr. Abel worked with Mr. Ehle as loan collectors for Vito Spillone.

THE COURT: Well, let's talk about prison relationships first, Aryan Brotherhood-type relationships, if any.

MR. MAC INTYRE: Abel and Ehle?

THE COURT: Yes.

MR. MAC INTYRE: Abel was in the same cell with Ehle out at TI following his arrest, and I believe, [369] if I'm not mistaken, he also was in prison with Abel in the past.

That's correct.

THE COURT: Well, give me a fuller offer of proof as to that. He, Abel, was in prison with Ehle in the past. Where and when?

MR. MAC INTYRE: I don't know the exact dates, your Honor. I think it was in the late—just a moment.

(Brief pause.)

At Lompoc on and off over the last ten years, and definitely for a two- or three-day period of time, Abel was in the same cell with Ehle at TI following the arrest. Prior to that time, they both were incarcerated on various charges on and off for a period of ten years and in communication with each other. And the same way with Mills. He served time with Mills from 1979 to '80.

THE COURT: All right. As part of the offer of proof, you've suggested that Mr. Ehle knows that Mr. Abel directed Mr. Mills to commit a homicide in Lompoc. What is the basis for that?

MR. MAC INTYRE: My understanding is from talking with him that Mr. Abel told him that, told Ehle that.

THE COURT: You've also indicated as part of your offer of proof that in order to become a member of [370] the Aryan Brotherhood, that you have to either kill or be involved as a participant in a killing; is that accurate?

MR. MAC INTYRE: That "Blood in and blood out" is the motto. The only way you get out of it is to get killed and the only way you get into it is either kill somebody yourself or be present when somebody is killed and participate in it.

THE COURT: Well, are we going to be involving Mr. Ehle in a declaration against penal interest?

MR. MAC INTYRE: No, sir. I have not—I'm just telling you what I know. I'm not saying that I'm going to elicit this testimony at trial. I'm responding to the Court's inquiry of the relationship of the Aryan Brotherhood to Mills and to Ehle and to Abel. I did not ask Ehle at any time if he ever, as part of his initiation into the Aryan Brotherhood, killed somebody.

THE COURT: All right. Now, Mr. Ehle, as I understand it, would be testifying that Mr. Abel was one of the twelve founders of the Aryan Brotherhood?

MR. MAC INTYRE: That's what he related to us this morning.

THE COURT: Now, what is the basis of that knowledge?

MR. MAC INTYRE: Pardon me?

[371] THE COURT: What is the basis of Mr. Ehle's knowledge? First of all, as to the fact that Mr. Abel is even a member of the Aryan Brotherhood.

MR. MAC INTYRE: Well, he tells me that Abel told him he was a member of it. Abel told Ehle he was a member of it. And he's just had—I had asked him the question about Abel's and Mills' membership in the Aryan Brotherhood. He said, "Well, that's a foregone conclusion." I said, "Well, would you narrow that down." And he said, "Well, I've had discussions with both of them about their membership in the Aryan Brotherhood, and other members of the Aryan Brotherhood told me that they were members also," and that both Mills and Abel had told Ehle they were members.

* * * * *

[385] There's another matter that might—

THE COURT: All right. Now, let's go back to the Mills-Ehle-Abel triumvirate, if we can, Miss Gomez. You've heard the offer of proof in this case. Do you wish to be heard in that regard?

MISS GOMEZ: Yes, your Honor. Again, assuming that there was some way that this could be proved—and at this point it's Ehle saying that these people have admitted these things to him, and I have questioned those particular individuals regarding their associations with the Aryan Brotherhood, and they have denied it. I cannot see what relevancy someone's association in the Aryan Brotherhood would have in a bank-robbery case. And I think there are so many collateral issues in this case, that I think everyone is losing focus of what it is that we're trying. We're trying a case of bank robbery. It seems like we're trying a case of loan sharking, it seems like we're trying a case of extortion, it seems like we're trying a case of who belongs to what association, and I think we're just kind of losing focus on what's going on. If the government were to be permitted to cross-examine Mr. Mills and say, "Isn't it true that you are a member of the Aryan Brotherhood and isn't it true that you have taken an oath," blah-blah-blah, even though Mr. Mills will say, "No, I am not a member," that would be so prejudicial [386] that there's no way—

THE COURT: Well, if that's all there was, you're right, even though the jury would be admonished that a question is not evidence except as it reflects its answer, and they're admonished to disregard the question. If that's all there was, and the Government said, "We don't have any evidence at all which would show he's a member of the Nazi Party or the Aryan Brotherood or the Mexican Mafia," or some other group that has a negative connotation to it, then of course that wouldn't be allowed, but the Government is representing that they have a witness who will testify that Mr. Mills and Mr. Abel have told that witness that they are both members of this Aryan Brotherhood. So there is some—you may say, "Well, it should be afforded slight weight, if any, because of the benefits that have been afforded this particular witness." But it is not a question of admissibility; is it a question of weight. Let's talk about the relevance of the particular testimony. Mills is going to try as best he can in his testimony—or this is what you would argue, at least. I'm not saying that Mills has the slightest improper motive. I don't know. The jury has to determine that. But if I can again shorthand it, Mills is going to try to impeach, hopefully fatally from your standpoint, the credibility of Ehle as [387] a witness. Now, doesn't that put into issue the credibility of Mr. Mills himself in every facet?

MISS GOMEZ: I think his credibility can be put in issue by way of his felony convictions, any other cross-examination that the Government may wish, but to try to impeach Mr. Mills' credibility by making reference to an organization that the only proof that we have that he belongs to that is that someone is saying that he does, I just feel that—

THE COURT: Well, let me go back. I have some deja vu in going back to this, because I believe we discussed it before. But let's assume as far as Mr. Mills—this is a hypothetical—that he was a member of the Aryan Brotherhood, and the Aryan Brotherhood has the tenets that Mr. MacIntyre has asserted in his offer of proof they have. So we're not questioning that as a fact. That is a given. Would that then be relevant?

MISS GOMEZ: I'm sorry. I didn't understand the question, your Honor.

THE COURT: Well, I'm asking you, so that we may hopefully intelligently attack this Evidence code Section 403 issue, whether or not the probative value is exceeded by the prejudicial effect. I'm trying to now start with whether or not it is relevant at all, and I'm asking you to accept for the sake of our theoretical [388] discussion that it is a fact that all three of these men are members of the Aryan Brotherhood and that the Aryan Brotherhood has the tenets and procedures that have been described by Mr. MacIntyre in his offer of proof. Would that be relevant?

MISS GOMEZ: No, your Honor. I think what organization a particular person—well, let me take that back. I think arguably it is relevant because of the representations that have been made in the offer of proof regarding they will lie on the stand.

THE COURT: Well, again—

MISS GOMEZ: Or that inference—

THE COURT: —we're now into the ivory tower, and that's a fact that we're looking at. We're not arguing whether or not it is a fact and that type of thing and the weakness or strength. It is a fact. So accepting it as a fact, would it be relevant?

MISS GOMEZ: I think, your Honor, it would be relevant, but only as far as asking, for example, "Isn't it true that you belong to an organization where you try to protect each other?," or "Isn't it true that you belong to an organization that you would be willing to lie for another member?" I think that's the farthest that something like that should be allowed to get to, but not the mention of "Aryan Brotherhood" or any other [389] organization that has the type of connotations that the Aryan Brotherhood has.

THE COURT: Remember, in my ivory-tower hypothetical, it's a fact that they are members of the Aryan Brotherhood. Given that fact, it shouldn't be mentioned?

MISS GOMEZ: Your Honor, I think, given so, it's too prejudicial to be allowed in a trial.

THE COURT: Do you wish to be heard further?

MISS GOMEZ: No, your Honor.

THE COURT: The Court has carefully, over the last couple of days, as a matter of fact, and last night and this morning, examined its conscience and Evidence Code Section 403 and the necessity of weighing the probative value of the evidence with the prejudicial value to the defendant. There's no question that this evidence is probative, relevant, admissible, as it goes directly to the credibility of Mr. Mills and is at the heart of the credibility of Mr. Mills. Certainly his testimony is a critical area in this case, because it reflects directly upon the Government's "star witness," and the government should be entitled by fair means to assess and attack the credibility of that particular witness.

Based on the offer of proof, which is a [390] substantial offer of proof, with some Spinelli, Aguilar specifics involved, it seems to the Court that the Goverment should be entitled to attack the credibility of Mr. Mills. I have determined that the probative value of this evidence does outweigh the prejudicial value, and I have made all the tests that I can, that I'm adjured to do by the Ninth Circuit, before I have come to this ruling.

* * * * *

[392] Are you going to be going into that?

MR. MAC INTYRE: No.

THE COURT: All right. Now, your next area of concern?

MR. MAC INTYRE: I will say, I am not going to go into it, but I do not know what questions will be asked on direct examination.

THE COURT: On cross-examination?

MR. MAC INTYRE: Yes. I'm not going to call Mills, and I don't intend to go into the two areas he just mentioned. My sole impeachment of Mills is going to be, one, his prior felony convictions; two, his relationship with Abel, the fact that they—from Abel, what he knows about their relationship, the fact that they're in the Aryan Brotherhood, and the code or creed of the Aryan Brotherhood.

THE COURT: Again, Miss Gomez, it's obvious, if Mr. Mills goes on the stand, that, at the very least, the fact of your client's prior convictions of felonies is going to be revealed. I think that's inherent in bringing Mr. Mills on, because it's going to develop their prior relationship—"their," Mr. Abel's and Mr. Mills'—in prison. I gather that you're aware of what I think is an obvious likelihood at the very least. Do you agree with that?

[413] * * * * *

THE COURT: One additional thing that I would like. It seems to the Court appropriate to have a limiting instruction on the testimony of Mr. Mills, and the impeaching testimony of Mr. Mills, as to what it is to be considered for. For example, if there is an Aryan Brotherhood relationship, that's not to be construed as evidence of guilt in this crime at all. It may be considered perhaps as it reflects upon the credibility of Mr. Mills. Now, Miss Gomez, if you feel you're entitled to such a limiting instruction and wish one given. I'm suggesting to you that it is your duty to submit one in writing to the court, so that the Court may consider it in giving it to the jury. It may be, for trial practical reasons, you don't wish one, and I respect that, but I'm simply trying to help you by suggesting that if you deem it appropriate, you should [414] submit such a limiting instruction.

All right. Anything further.

THE COURT: We'll be in recess.

* * * * *

[423] at this time.

MISS GOMEZ: Yes, your Honor. We would be prepared to call Robert Mills to the stand.

THE COURT: Very well. Are you prepared to proceed before the jury in that regard?

MISS GOMEZ: This is in front of the jury, your Honor.

THE COURT: All right.

MR. DIAMOND: Your Honor, I've been advised by Mr. Oppenheimer that in my absence, the Court made certain tentative rulings. Just so I understand the ground rules as well as Mr. Oppenheimer, it is my understanding that the Court has indicated that during cross-examination, the Government may be permitted to inquire of Mr. Mills as to membership in the Aryan Brotherhood, and that at that point we will discuss the matter further if an objection were raised.

THAT COURT: Yes. And counsel were to come to side bar before any Fifth Amendment privileges were asserted. It is, I've said on the record previously, my understanding from Miss Gomez—and that, of course, is the only knowledge I have on the question—that Mr. Mills' response would be in the negative should he be asked that question. But at any rate, before any Constitutional privileges are asserted, we have agreed— [424] I'm not sure whether you were there or not, but we have agreed that there would be an approach to side bar and a discussion of it, and I have asked counsel for any authorities that they might have which would indicate one way or the other whether or not it's appropriate to assert the privilege before the jury or outside the presence of the jury. At any rate, we'll proceed when that does occur.

MR. DIAMOND: Your Honor, a suggestion occurred to me after we left your chambers, and that was to suggest to the Government that the question be reframed in a manner to inquire in the same area but avoid the difficulty that we're all encountering, and that would be for the question to be asked in the following terms: whether Mr. Mills and Mr. Abel are members of an organization together, without making reference to any particular organization. I think

that would go a substantial way in resolving the problems that we see, and indeed, would allow Mr. MacIntyre the same latitude on cross-examination that he otherwise would have, particularly with respect to the rebuttal witness.

THE COURT: How about that at least as a preliminary understanding, Mr. MacIntyre, that we do not use the name itself of the Aryan Brotherhood, but we speak of it in some other generic fashion or descriptive fashion?

[425] MR. MAC INTYRE: Well, your Honor, I don't like to cross-examine with my hand tied behind my back, but I think that that perhaps, in view of the Court's ruling—and I certainly appreciate Mr. Diamond and the other gentleman's concern—is agreeable with the Government.

THE COURT: All right.

MR. MAC INTYRE: However, if certain matters are gone into—I mean, I'm going to develop the organization on cross-examination in some respects, that there is a bond in the organization and the two criteria for that particular bond, but I will refrain from using the term "Aryan Brotherhood," as suggested by Mr. Diamond.

THE COURT: Thank you.

Is that agreeable with you, Miss Gomez?

MISS GOMEZ: Yes, your Honor.

THE COURT: Let's have an additional understanding, then, before any counsel utilizes that term, that we have a side-bar conference regarding it. Is that agreeable?

MISS GOMEZ: Well, just to be clear on the record, your Honor, it's acceptable that we have the side-bar conference. It is, of course—

THE COURT: You're not waiving any of your prior objections.

[428] DIRECT EXAMINATION

BY MISS GOMEZ:

Q Mr. Mills, do you know John Clyde Abel, who is seated at the counsel table with me in the brown suit?

A Yes, I do.

Q And have you known him for a very long period of time?

A About a year and a half.

Q Do you also know a person named Kurt Ehle?

A Yes, I do.

Q How well do you know Mr. Ehle?

A Very well.

Q For approximately how long a period of time have you known him?

A About two and a half years.

Q Did you have a conversation with Mr. Ehle recently?

A Yes, I did.

Q Could you tell us approximately when that conversation was and where.

A It was approximately maybe three or four weeks ago, and it was in Unit J-1 in Terminal Island.

Q Exactly where were you when you had the conversation with Mr. Ehle?

A I was locked in my cell on the second tier, [429] and he had come down to talk to me.

Q What was the substance of the conversation that you had with Mr. Ehle?

THE COURT: Rather than the substance, to assist the jury, what did he say and what did you say?

BY THE WITNESS:

A He came down about 7:30 at night, and he told me his intention was to implicate John Abel on a bank robbery—

MR. MAC INTYRE: Objection, your Honor. It's not in response to the question, who asked who or what asked what.

THE COURT: Tell us as best you can, Mr. Mills—I appreciate it's impossible to give us the exact words, but if you can start out by saying, "He said," and then give us as best you can his precise words. Do you understand the question, sir?

THE WITNESS: Yes.

THE COURT: Thank you.

BY THE WITNESS:

Q He said—he came down to the cell, and I asked him how he got on the tier. He said he was an orderly. And he was acting kind of nervous, and I asked him what was wrong, and he said that—he told me his [430] plan about

joining a Federal witness program and implicating John Abel in a bank robbery to insure his own freedom.

Q Did he tell you when this bank robbery had occurred?

A He just—I think he mentioned a couple weeks before I talked to him.

Q And did he say whether John Abel was one of the bank robbers?

A He told me that John Abel was not one of the bank robbers.

Q Did he tell you whether he was going to say that he was or was not?

A He told me that he intended to implicate John in a bank robbery because he hadn't been out of prison 60 days and they had him back in jail, and he thought they were going to give him 25 years for the robbery, and he told me that he couldn't do that time, so he intended to implicate John, because John would be his ticket to the streets.

Q And did he tell you how he thought that this would help him get out of prison?

A He told me that he intended to make a deal with the Federal authorities to implicate John, so that they [431] would let him out, you know, with—his exact words to me was that he would be out within a year.

Q Did he tell you why he was telling you this information, why he was giving you this information?

A Well, we were very close friends, like I said, and when we were up at Lompoc, our wives lived together, and we visited every day together. And he said that he was looking out for me, since I was his only friend, real close friend, and what he wanted me to do was join the program with him, and he said that we could strengthen each other's stories, and that we would both be out within a year.

Q So did he ask you to do something?

A He said that he would—I asked him, "Did John rob the bank?" He said, "No, John didn't rob the bank." I told him, "Well, how are you going to be able to prove it?" And he says, "When I walk in the courtroom with Federal marshalls all around me, the jury will believe me." You know. He says, "I will be a Government witness." And at that point I told him, "Well, if we get on the stand and say that,

it will be perjury if—because they'll find out that we're lying." And he says, "I'll tell you what to say. Don't worry about it." He goes, "I'm looking out for you because I know you're going to [432] have to be in about ten more years, and if we do this, we'll both be out within a year if we make a deal with the Federal authorities."

Q And what was your response to that?

A I told him that it was wrong. I told him that he's trading in a guy's life to go to prison for something he didn't do, so that Ehle could go to the streets.

Q Mr. Mills, has anyone asked you to testify here today?

A No.

Q Why are you testifying here today?

A Because—well, I laid and thought about it, ma'am, and, you know, I don't usually get involved in people's affairs in prison, but there's a guy getting ready to go to prison that didn't do anything wrong—he wasn't involved in this—for a guy that wanted his freedom.

Q Now, you made reference to you being in prison before. Have you ever been convicted of a felony in the past in your adult life?

A I've only been convicted once in my adult life, when I was 18. I've been in prison since 1975.

Q What were you convicted of?

A A robbery.

[433] MISS GOMEZ: I have no further questions at this time.

THE COURT: Thank you.

For the jury's information, Mr. Mills does have counsel, who are present.

Gentlemen, if you would simply identify yourselves, please.

MR. DIAMOND: Charles Diamond.

MR. OPPENHEIMER: Randy Oppenheimer.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. MAC INTYRE:

Q Mr. Mills, you're 24 years old, aren't you?

A 25.
Q When were you 25?
A In March.
Q What was the felony conviction you are in prison for?
A A robbery.
Q And when did that occur?
A In 1975.
Q All right. You refused to talk to the Government prior to testifying today, didn't you?
A Yes, I did.
[434] Q Now, you say you're a real close friend of Mr. Abel?
A No. I'm—I wouldn't say a real close friend. We were acquaintances. We were friends. I knew him; he knew me.
Q How did you know him?
A Well, when he was on—I'll refer to the main line as "population"—I was in the hole for about nineteen months. I came to the visiting room every day, and I would see John out there, and periodically got to know him over that nineteen months.
Q Where was this main line?
A That's the population of the prison.
Q What prison?
A Lompoc.
Q All right. Do you and John, Mr. Abel, belong to any organization together?
A No, I don't.
MISS GOMEZ: Objection, your Honor.
THE COURT: Overruled.
BY MR. MAC INTYRE:
Q You do not belong to any organization together?
A No, I don't.
Q Now, in this conversation, what date did this [435] conversation take place with Mr. Ehle?
A As—for the specific date, it was the day before—Ehle had disappeared the next day. I had come down to court. So did John and Mr. Ehle. We all come down here together in the Federal Building. I think they got arraigned that day. I'm not positive of the date. But one of the attorneys could probably give it to you.

Q Now, at the time Mr. Ehle talked to you, you were on the second tier below him?
A That's right.
Q And he was in the same cell with Mr. Abel?
A I'm not sure about that. I know he lived on the third tier.
Q Isn't it a fact that when Mr. Ehle came down to see you, that you asked him, "Did John have any bait money on him?"
A I never said that. That's not true.
Q You never made any statement to him about bait money?
A No, sir.
Q You're as sure of that testimony as you are of your testimony today?
A I'm very sure of it.
Q Did you ask him anything about the kid?
[436] A What kid is that?
Q Do you know Ron Gremard?
A Oh, that—that younster, [sic] I just met him this morning, when we were coming over here together.
Q Did you ask Mr. Ehle what happened to the kid, use the word "kid"?
A I didn't even know him then. I just met him this morning.
Q You are referring to him as a youngster?
A He's about my age.
Q Now, isn't it a fact that in that conversation, you tried to get Mr. Ehle's home phone number?
A When I first came to Terminal Island, like I say, we were close friends. I had his wife, Kathy, I had her phone number recently—or previous to that, but when I got to Terminal Island, you know, I wanted to contact him. He was my friend. He was on the streets. I tried to get his phone number from a couple of the people there, but he had said that he didn't want anybody calling his house, so he didn't give me his number.
MR. MAC INTYRE: Your Honor, could we approach the bench?
THE COURT: Yes.

(The following proceedings were had between [437] the Court and counsel at side bar, outside the hearing of the jury:)

MR. MAC INTYRE: Your Honor, I intend to ask him if he's a member of the Aryan Brotherhood and I'm going to ask him if Mr. Abel is a member of the Aryan Brotherhood, if Mr. Ehle is a member of the Aryan Brotherhood, and is it not a fact that the Aryan Brotherhood has a creed that individuals will lie to protect other individuals, and that they, as part of their bond in the Aryan Brotherhood, will deny any membership or association with it. And I think it goes to his credibility, it goes to his bias and prejudice in this case.

MISS GOMEZ: Your Honor, I would pose the same objections that I've been posing in chambers, and that is that the U. S. Attorney may perhaps get into whether they belong to any organization, which he already has, but to go any further and actually make reference to the Aryan Brotherhood or make reference to any kind of motto, that that would just be prejudicial, and that's like ending the case at this point; that my client will be denied of a any type of a fair trial because of the prejudicial effect of such type of questioning.

MR. OPPENHEIMER: Your Honor, there doesn't [438] seem to be any independent purpose served by reference to the name of the organization whatsoever as far as we can tell; that some of those same questions could not be pursued on the basis of reference to an organization, as we discussed prior to the jury being called back, and I continue to be unpersuaded that there is an independent reason to go beyond that, to the extremely prejudicial connotation of the term, as we've discussed in chambers and as we discussed at the beginning of the hearing.

THE COURT: I wonder, Mr. MacIntyre, if you can proceed with asking him about membership in a prison organization or has he heard of such an organization which has various tenets, without using the name itself?

MR. MAC INTYRE: All right.

THE COURT: If he denies right down the line, I don't think you need to bring up the name "Aryan Brotherhood."

MR. MAC INTYRE: I can explore the area by using "a prison organization which has as part of its creed to lie to protect its own."

THE COURT: Yes. I think you should indicate, so that the jury isn't confused—I gather this is correct—that it is a secret organization, as opposed to—

[439] MR. MAC INTYRE: Oh, yes.

THE COURT: I'm sure there are numerous organizations that are—

MR. MAC INTYRE: Well, I wanted to get the Court's preliminary ruling, and then I would proceed on that.

THE COURT: There are numerous organizations that the correctional institutions sponsor. I think you have to make it clear, if we're not using the name, that it's a secret organization.

MR. MAC INTYRE: I will.

THE COURT: All right. Let's proceed.

(Whereupon, proceedings were resumed in open court, within the hearing of the jury.)

BY MR. MAC INTYRE:

Q Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?

A No, I don't.

Q Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that the members thereof will first of all deny they belong to that secret organization?

A No, I don't.

[440] MISS GOMEZ: Your Honor, excuse me. For the record, I will continue to object during this line of questioning.

THE COURT: Very well. The objection is overruled.

You may proceed.

BY MR. MAC INTYRE:

Q And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in that secret organization, prison organization?

A I know of no organization like that.

MR. MAC INTYRE: No further questions.
THE COURT: Thank you.
MISS GOMEZ: No further questions, your Honor.
THE COURT: Thank you, sir. You may step down.
MR. DIAMOND: Your Honor, may we be excused?
THE COURT: Yes, you are excused.* * * * *
[499]* * * * *

KURT E. EHLE,

called as a witness in rebuttal by the plaintiff, being first duly sworn, was examined and testified as follows:

THE CLERK: State your full true name and spell your last name for the record.
THE WITNESS: Kurt Edward Ehle, E-h-l-e.

DIRECT EXAMINATION

BY MR. MAC INTYRE:
Q Mr. Ehle, do you know a gentleman by the name of Robert Mills?
A Yes, I do.
Q How long have you known Mr. Mills?
[500] A Approximately three years.
Q Were you ever in the penitentiary with him at any time?
A Yes, I was. I was in Lompoc with him in '79 and '80.
Q Directing your attention to approximately September 9th or 10th of this year, were you out at Lompoc Prison, being confined there? I mean—excuse me—at TI.
A No, I wasn't.
Q Were you at Lompoc?
A No, I wasn't.
Q Were you at someplace of confinement where Mr. Mills was at?
A Not on September 9th or 10th, no.
Q How about soon thereafter?
A It was somewhere around the 20th that I was out at TI with him, Terminal Island.
Q When you were out at TI, were you in the same cell with Mr. Abel?
A yes, I was.

Q And during the time you were there, directing your attention to that day, approximately, did you have occasion to go down on the lower tier, where Mr. Mills' [501] cell was?
A Yes, I did.
Q And did you engage in a brief conversation with him?
A Yes, I did.
Q How long would you say the conversation lasted?
A Approximately ten minutes.
Q What, if anything, was said to you by Mr. Mills or what, if anything, did you state to him?
A Well, initially, the conversation had to do with the fact that he was a little upset at me for not allowing him to have my phone number while he was in custody and I was on the streets, and there—
Q Excuse me a minute. Prior to talking to Mr. Mills or having that conversation, had you met with the FBI agents and given them the version and told them of what had happened in regard to the events of that bank robbery?
A Yes, I had.
Q Was there any attempt in your mind to conceal this fact from Mr. Mills?
A Yes, there was.
Q And did that have anything to do with the fact that Mr. Mills was a member of any secret prison [502] organization?
A Oh, certainly.
Q Is Mr. Mills a member of such a prison organization?
MISS GOMEZ: Ojbection, [sic] your Honor. Same grounds as before.
THE COURT: Overruled.
You may answer.
BY THE WITNESS:
A Yes. Yes, he is.
Q And do you know whether or not Mr. Abel is a member of such an organization, the same secret prison organization?
MISS GOMEZ: Objection, your Honor.
THE COURT: Overruled.
You may answer.

BY MR. MAC INTYRE:

Q Would you answer the question.

A Yes, I do, and yes, he is.

Q So that prior to having your conversation on this date with Mr. Mills, you had already been interviewed by the FBI and had told them them the facts of which you previously testified involving this instant bank robbery on September 8th?

[503] A Yes, I had.

Q Now, after Mr. Mills asked you for your home—was it for your home telephone number?

A Yes.

Q Is that the number where your wife and children resided?

A Yes, it was.

Q And what, if anything, else did he state to you?

A Towards the latter part of the conversation, this case or this robbery was touched upon lightly. He asked me—the first thing he asked me—I remember it clearly—he says, "Is it true that John had bait money in his pocket from the bank robbery?" And I believe my reply to that was: "Yes, I believe he did." The next thing he asked me was in regards to Gremard's not covering the license plate. And the last thing I think that he asked me was how good of a case the FBI had or something like that, and I told him that, you know, especially in regards to myself, pretty good.

Q This secret prison organization which you have testified that Abel and Mills were members of, how do you know that Mr. Abel is a member of such an organization, secret prison organization?

A Well, first and foremost, I've known Mr. Abel [504] for a good many years, and I have been told by him and others that he is a ranking member in this organization.

Q And how about Mr. Mills' relationship to this secret prison organization; how do you know that Mr. Mills is a member of such an organization?

A Not only having been told by other people, him as well, I also read a letter or a kite that was directed to Mr. Abel confirming that he was a member of this organization.

Q Now, does this organization have any type of creed whereby those that are members of the organization in the prison system must abide by?

A Yes, it does.

Q Just basically, what is the creed in regard to letting others know you're a member of the organization or in testifying on behalf or against another member?

A Well, firstly, it's supposed to be denied that there is such an organization at all costs for protection, for protection of the organization, and secondly, you know, you are to do anything you can, you know, lie, cheat, steal, kill, anything you can, to protect another member of the organization.

Q And what, if any, measures by this secret prison organization are used if one does not abide by the [505] code within the prison system?

MISS GOMEZ: Objection, your Honor, under 608 and 403.

THE COURT: The objection is sustained.

BY MR. MAC INTYRE:

Q Now, you have known Abel for how long?

A Back in the late '50's or early '60's.

Q Did you become aware of his association in this secret prison organization from being in prison with him?

A Yes.

Q Now, during this conversation with Mr. Mills, did he use the words asking you about a younger person with you or a kid, or words of that nature?

A I don't understand it. Would you repeat the question?

Q The question perhaps is confusing. Was the name "Gremard" used in this conversation at all?

A Oh, yes. Yes. Yes, it was.

Q And what reference and by whom was the name "Gremard" used?

A It was used by Mills in regards to his lack of expertise in covering the license plate on the escape vehicle.

[506] Q During the robbery, are you aware of any attempt to cover the license plate on the Camaro?

A Yes, I am.

Q What, if anything, are you aware of?

A I'm aware that a book was supposed to have been placed over the license plate, thereby covering the number, and it apparently didn't happen. It wasn't—I didn't see it done and I didn't see it not done.

Q Did you tell Mr. Mills at any time—first of all, how long did this conversation last, approximately?

A Between Mills and myself?

Q Yes.

A Approximately ten minutes.

Q Did you at any time tell him that Abel did not have anything to do with the bank robbery of September 8, 1981?

A No, I didn't.

Q Did you at any time tell him that the only reason you were testifying is to protect your family?

A No, I didn't.

Q Did you at any time tell him that you were fabricating or making up a story about Abel's participation in the robbery of September 8th to save yourself?

A In view of the fact of how close Abel and Mills [507] were, it would be suicide for me to say any of those things to him.

Q Why do you say that it would have been suicide?

A The penalty for that's death.

MISS GOMEZ: Objection, your Honor.

THE COURT: The objection is sustained.

BY MR. MAC INTYRE:

Q Is your fear of harm to you from the secret prison—

MISS GOMEZ: Objection. Assumes facts not in evidence.

THE COURT: Sustained.

BY MR. MAC INTYRE:

Q You're a member of this secret prison group also, are you not?

A I'm directly connected, yes.

MR. MAC INTYRE: Just one moment, your Honor.

(Brief pause.)

No further questions at this time.

THE COURT: Thank you.

You may examine, Miss Gomez.

[508] CROSS-EXAMINATION

BY MISS GOMEZ:

Q Mr. Ehle, you were arrested on September the 10th, isn't that correct, on this particular case?

A Yes, that's correct.

Q And when you were arrested, you were interviewed by several agents; isn't that correct?

A That's correct.

Q Approximately how many agents did you speak to about this case?

A Are you speaking about the day of my arrest?

Q The day of your arrest and following up to the 15th, when you entered into the plea agreement.

A I have no idea. There were four or five agents present.

Q And they told you how much time you were going do do on this case; isn't that right?

A I don't believe they ever mentioned exactly how much time was involved in this. I knew. They asked me, and I knew.

Q But they told you it was substantial time; isn't that correct?

A Oh, indeed—

MR. MAC INTYRE: Your Honor, object to counsel arguing with the witness. The witness answered that the [509] agents did not tell him now much time he would do.

THE COURT: Sustained.

BY MISS GOMEZ:

Q And you had just been out of prison for two months, isn't that correct, when you were arrested?

A No. I had been out of prison for five months.

Q And you're tired of being in prison, aren't you?

MR. MAC INTYRE: Objection, your Honor. That's speculative and argumentative.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A Yes, I am.

Q You want to spend more time with your family, don't you?

A I believe that would be a logical assumption, yes.

Q You love your family very much, don't you?

A Indeed.

Q Now, you stated that you are a member of this secret prison organization; is that not true?

A I said I was directly connected, yes.

Q I'm sorry. I couldn't hear you.

A I said I was directly connected with them, yes.

[510] Q So you are also supposed to deny that there is such a secret organization; is that correct?

A At that point in time, if you're speaking of the arrest, yes, it was obligatory for me to deny it.

Q And you also are supposed to lie, cheat, and steal, you said; is that correct?

A At that time I was, yes.

Q You say, "at that time." You're talking of the day that you were arrested?

A Yes.

Q But you're no longer a member of that organization, so you don't have to follow that; is that correct?

A That is correct.

Q Now, when you spoke to Robert Mills, you had already entered into a plea agreement with the Government; isn't that true?

A Yes.

Q And you were afraid that the Government might not believe everything that you had to say; isn't that correct?

A Could you repeat that question?

Q Yes. And you were afraid that the Government might not believe everything that you had to say about the [511] bank robbery; isn't that correct?

A I had no doubts about their believing anything I had to say, no.

Q Mr. Ehle, isn't it true that you approached Mr. Mills so that he would corroborate your story?

A No.

Q You indicated you received a letter from someone,

and that person was saying that Mr. Abel was a member of this secret organization. Do you have that letter?

MR. MAC INTYRE: Your Honor, I believe the question misstates the evidence. The witness testified he read a letter that Abel was mailing to Mr. Mills.

THE COURT: Perhaps you can lay the foundation. And I'm not sure that your question as posed does represent the facts in his previous testimony.

BY MISS GOMEZ:

Q Mr. Ehle, you testified to something regarding a letter that you had seen. Who was the letter from?

A Mills.

Q And who was it being sent to?

A Abel.

Q And Mills gave it to you to read?

A No. Abel and I were in the same cell. There [512] were two letters sent. One was to me; one was to Abel. They were both in the same envelope. We both read—he read the letter—Abel read the letter to me and I read the letter to him.

Q So you don't have that letter?

A Of course not. No.

Q Who was the person that was told to put a book on the license plate?

A Gremard.

Q Who told him to do that?

A Abel.

Q Mr. Ehle, isn't it true that you are considered to be in charge of intelligence on banks?

A Yes, I guess you could say that in regards to this situation.

Q And at the time that Mr. Gremard was told to put a hood over the license plate, you were going to go and rob a bank; isn't that correct?

A That's correct.

MISS GOMEZ: I have no further questions, your Honor.

THE COURT: Thank you.

[513] REDIRECT EXAMINATION

BY MR. MAC INTYRE:

Q Mr. Ehle, at the time that you committed the robbery, as you testified, with Mr. Abel and Mr. Gremard, were either you, Mr. Gremard, or Mr. Abel in debt of money to this secret prison organization that you wanted to pay back?

MISS GOMEZ: Objection. Relevancy.

THE COURT: I believe it's outside the scope of—

MR. MAC INTYRE: Your Honor, I think counsel—may we approach the side bar? I don't want to—

THE COURT: Yes.

(The following proceedings were had between the Court and counsel at side bar, outside the hearing of the jury:)

MR. MAC INTYRE: Your Honor, I think counsel opened up this subject on cross-examination by asking isn't it a fact that Ehle was in charge of the intelligence for the banks, and I think the Government has the right to pursue that with what Abel was in charge of. Abel was I believe in charge of robbing jewelry stores, and they couldn't find a jewelry store to rob, so they concentrated on the bank. And the reason they were committing the robbery was that all of these people were in debt to this [514] secret prison organization, i.e., which we haven't mentioned, and I think I ought to be able to have the right, with the Court's discretion, to go into this a little bit.

THE COURT: Miss Gomez.

MISS GOMEZ: Your Honor, I don't see the relevancy of how robbing jewelry stores is related to robbing the bank and of what relevancy it would be to inquire into money that is owed at this particular juncture of the case.

THE COURT: There's an old Biblical admonition: Sufficient unto the day is the evil thereof. I'm going to sustain the objection under Evidence Code Section 403.

Let's proceed.

(Whereupon, proceedings were resumed in open court, within the hearing of the jury.)

BY MR. MAC INTYRE:

Q When you say the letter was destroyed, what do you

mean by that? Is there a reason why it was destroyed?

A The letter from Mills to Abel? Yes. Those are pretty damning evidence in the hands of the authorities or the prison guards or whatever.

Q Did that letter outline the activities of other members of this secret prison organization that you and [515] Abel and Mills were members of?

A To a slight degree, yes.

MR. MAC INTYRE: No further questions.

THE COURT: Anything further?

MISS GOMEZ: No further questions, your Honor.

THE COURT: Thank you. You may step down, sir.

MR. MAC INTYRE: Mr. Alba of the FBI. May witness be excused, your Honor?

THE COURT: Any objection?

MISS GOMEZ: No objection, your Honor.

THE COURT: You are excused, sir.

* * * * *

Supreme Court of the United States

No. 83-935

UNITED STATES, PETITIONER

v.

JOHN CLYDE ABEL

ORDER ALLOWING CERTIORARI. Filed March 19, 1981.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

No. 83-935

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CLYDE ABEL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a witness may properly be impeached by showing that he and the party for whom he testifies belong to a group whose members are sworn to commit perjury on each other's behalf.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 707 F.2d 1013.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983, and amended on June 6, 1983. A petition for rehearing was denied on September 7, 1983 (Pet. App. 11a). On October 26, 1984, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 6, 1983. The petition was filed on that date and was granted on March 19, 1984 (J.A. 50). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and sentenced to 25 years' imprisonment (Pet. App. 1a).[1] A divided panel of the court of appeals reversed his conviction.

1. On September 8, 1981, four men robbed the Bellflower Savings and Loan Association in Bellflower, California (1 Tr. 123-128, 131; 2 Tr. 190-192; GX 11, 12).[2] A witness observed the license number of the get-away car, a white Camaro, and the FBI determined that the car was registered to Anna Sainz (1 Tr. 130-131; 2 Tr. 194; GX 9, 10, 18).

Later that day, several members of the Los Angeles County Sheriff's Office interviewed Sainz at her home (2 Tr. 202-203, 206-216, 284). She told the officers that she had loaned the car that morning to respondent, who had left in it with her housemate Ronald Gremard and another man (2 Tr. 196, 198, 208, 214-215). She said that respondent and Gremard had later returned the car and had departed again in respondent's Ford pickup truck (2 Tr. 198-202). Sainz said that she expected them both to return that evening (2 Tr. 201). The officers searched the house with Sainz's consent and found a bank bag in one of the bedrooms (2 Tr. 263-265, 285; GX 2). They then

[1] Ronald Gremard and Kurt Edward Ehle, who were indicted together with respondent, pleaded guilty. As part of his plea bargain, Ehle testified for the government (Pet. App. 2a).

[2] Bank employees and a bank visitor identified respondent from a photo spread as one of the armed robbers who appears in a bank surveillance photograph (1 Tr. 71-73, 79-80, 87-89, 105-108, 121-122, 136-138, 140-141, 143, 150, 152-153; 2 Tr. 229, 308-311; GX 16).

awaited the return of respondent and Gremard (2 Tr. 265-269, 275-276).

After dark, respondent and Gremard returned to the house in a Ford pickup truck and were arrested (2 Tr. 202-203, 205-206, 265-269, 275-276). The officers seized some clothing from the seat of the pickup (2 Tr. 286-287, 291-292; GX 8). A search of respondent's person at the police station uncovered a bait bill from the Bellflower Savings and Loan, as well as eight Susan B. Anthony silver dollars alleged to have been taken in the robbery (1 Tr. 113-115; 2 Tr. 288-290, 292-293; GX 4, 5, 23A).

At trial, Kurt Ehle, one of respondent's co-defendants, testified for the government and implicated respondent as one of the bank robbers. Respondent called Robert Mills to impeach Ehle (J.A. 32-40). Mills, who was imprisoned with Ehle and respondent and had been friendly with them both, testified that Ehle had said that he intended to give false testimony identifying respondent as one of the robbers in order to obtain a more lenient sentence (Pet. App. 4a; J.A. 33-35).

Before trial, in anticipation of Mills's testimony, the prosecution had apprised the district court that Mills, Ehle, and respondent were all members of a prison gang called the "Aryan Brotherhood."[3] According to the prosecutor's offer of proof, a tenet of the Aryan Brotherhood requires its members to deny the existence of, and their membership in, the organization and to lie to protect fellow members (J.A. 24). Anticipating that effective cross-examination of Mills

[3] The Aryan Brotherhood is "a white supremacist prison gang." *United States* v. *Mills*, 704 F.2d 1553, 1555 (11th Cir. 1983), petition for cert. pending, No. 83-5286.

could not avoid reference to the Aryan Brotherhood, the prosecutor had sought guidance from the district court (J.A. 8-9).[4]

Defense counsel objected to cross-examination regarding the Aryan Brotherhood on narrow grounds. She conceded that Mills's membership in the Aryan Brotherhood was relevant but stated (J.A. 29):

> I think, your Honor, it would be relevant, but only as far as asking, for example, "Isn't it true that you belong to an organization where you try to protect each other?," or "Isn't it true that you belong to an organization that you would be willing to lie for another member?" I think that's the farthest that something like that should be allowed to get to, but not the mention of "Aryan Brotherhood" or any other organization that has the type of connotations that the Aryan Brotherhood has.
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> * * * * *
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> Your Honor, I think * * * it's too prejudicial to be allowed in a trial.

At no time during the lengthy discussion of this issue did defense counsel object to references to the Aryan Brotherhood on the ground that such examination would unconstitutionally impinge upon respondent's associational rights. Nor did Mills's attorneys, who were present to advise him, voice any concern about the impact of the examination upon their client's constitutional rights (J.A. 31, 38).

At the conclusion of all the pretrial argument, the trial judge held that the evidence was admissible and

[4] The district court considered the question at length during hearings in chambers (J.A. 8-32). The court received offers of proof regarding Mills's and Ehle's testimony (J.A. 10, 15, 23-26) and heard the argument of counsel.

that its probative value outweighed any possibility of prejudice (J.A. 29). He also asked counsel to request a side-bar conference before using the term "Aryan Brotherhood" during trial (J.A. 32).

Accordingly, before cross-examining Mills on his membership in the Aryan Brotherhood, the prosecutor requested a side-bar conference and outlined the questions he proposed to ask (J.A. 38). Defense counsel responded (*ibid.*) that "the U.S. Attorney may perhaps get into whether they belong to any organization," but she objected to any "reference to the Aryan Brotherhood or * * * any kind of motto."[5] The court therefore ruled that the prosecutor should refer to a "secret prison organization" rather than naming the Aryan Brotherhood (J.A. 38-39). Although this ruling appeared to eliminate defense counsel's sole ground for objection, she objected without explanation when Mills was asked the following questions (J.A. 39):

> Q. Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?
>
> A. No, I don't.
>
> Q. Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that the members

[5] The prosecutor's offer of proof indicated that the organization's motto is "Blood in, Blood out," which means that "[t]he only way you get out of it is to get killed and the only way you get into it is either kill somebody yourself or be present when somebody is killed and participate in it." J.A. 24, 25. See *United States* v. *Silverstein*, No. 82-2453 (7th Cir., Apr. 26, 1984), slip op. 2. This evidence was not introduced.

thereof will first of all deny they belong to that secret organization?

A. No, I don't.

Q. And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in that secret organization, prison organization?

A. I know of no organization like that.

In rebuttal, the government called Ehle, who testified that both Mills and respondent were members of a secret prison organization whose members were pledged to deny the organization's existence and to "lie, cheat, steal [and] kill" to protect other members (Pet. App. 6a; J.A. 43).[6] Defense counsel stated (J.A. 43) that she objected "under [Fed. R. Evid.] 608 and 403" but did not elaborate.

The judge offered upon request to instruct the jury not to consider Ehle's testimony for any purpose other than assessing Mills's credibility (J.A. 30-31). Respondent did not request such an instruction.[7]

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[6] Ehle knew that Mills and respondent were members of the Aryan Brotherhood because respondent, whom Ehle had known "for a good many years" (J.A. 42), had admitted to being a "ranking member in this organization" (*ibid.*), and because respondent had allowed Ehle, when the two shared a cell, to read a letter from Mills that confirmed their membership in the Brotherhood (J.A. 42, 46-47, 48-49). Ehle, too, admitted to being "directly connected" with the secret prison group (J.A. 44).

[7] During the conference on the jury instructions, defense counsel offered only one additional instruction (3 Tr. 535), which concerned how the jury should construe the testimony of a witness who asserts his Fifth Amendment privilege. That instruction was given (6 Tr. 639-640).

2. A divided court of appeals reversed respondent's conviction.[8] Conceding that a trial court has broad discretion to admit or exclude evidence (Pet. App. 6a), the court of appeals nevertheless held that the trial judge had committed reversible error by allowing Mills to be impeached by proof that he and respondent belonged to a group whose members were sworn to commit perjury on each other's behalf (*id.* at 5a).

Observing that the government may not convict an individual merely for belonging to an organization that advocates illegal activity (*Scales* v. *United States*, 367 U.S. 203, 219-224 (1961); *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969)), the majority reasoned (Pet. App. 5a):

> Neither should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value. It establishes nothing about the individual's own actions, beliefs or veracity.

The majority added that the "suggestion of perjury, based purely on a group tenet, without any showing that Mills personally accepted such a tenet, * * *

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[8] The court of appeals upheld the denial of respondent's motion to suppress the money found on his person after his arrest (Pet. App. 2a-3a). The court held that the sheriff's officers had probable cause to arrest respondent and that the search was properly made incident to arrest (*ibid.*). For the same reason, the court upheld the denial of respondent's motion to suppress the shirt found on the seat of the pickup (*id.* at 3a n.1).

Because of its disposition of the impeachment issue, the court of appeals did not decide whether the trial judge erred in refusing to permit respondent to call an alibi witness whose name did not appear on respondent's notice of intention to offer an alibi defense (Pet. App. 4a).

makes such testimony unacceptable" (*id.* at 6a). The court also found that the rebuttal testimony had unfairly prejudiced respondent "by mere association" (*id.* at 7a).

Judge Kennedy dissented (Pet. App. 8a-10a). He stated (*id.* at 8a) that "[t]he line of questioning barred by the majority in this case is akin to inquiry respecting family ties, prior business relations, or the myriad other past or present associations that may cause a witness, consciously or otherwise, to color his testimony. There is consensus that such matters are admissible, as probative on the issue of bias." He added (*ibid.*) that "if the tables were turned and a key prosecution witness were a member of a gang such as the one here, I should think it would be error to reject defense efforts to show bias through gang membership. See *Davis* v. *Alaska*, 415 U.S. 308, 316-317 * * * (1974)."

Judge Kennedy found *Scales* and *Brandenburg* inapposite because "[t]hey stand only for the proposition that membership alone is not sufficient for the imposition of a penalty" and do not preclude consideration of membership in assessing a witness's possible bias (Pet. App. 9a). He elaborated (*ibid.*): "The witness who is impeached by membership in a group sworn to perjury is subject to no sanction other than that his testimony may be disbelieved."

Judge Kennedy stated (Pet. App. 10a) that a trial judge has discretion to admit extrinsic evidence showing bias, and he concluded (*ibid.*) that the trial judge in this case had not abused that discretion in holding that the probative value of Ehle's testimony outweighed the possibility of unfair prejudice to respondent.

SUMMARY OF ARGUMENT

Mills, who testified for the defense in this bank robbery prosecution, was properly impeached by the admission of evidence that both he and respondent belonged to "a secret prison organization" whose members are sworn to lie to protect each other. The court of appeals' decision holding that such proof is inadmissible is a startling departure from settled law regarding proof of a witness's bias and is supported by neither precedent nor reason.

1. One of the primary functions of the trier of fact in any legal proceeding is to assess the credibility of the witnesses, and one of the best ways of making that assessment is to examine whether a witness is "biased," *i.e.*, whether he has any motive to lie or slant his testimony. For this reason, it is firmly established that proof of a witness's bias is always relevant. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). Indeed, evidence of bias is regarded as so important in evaluating credibility that such proof is never regarded as collateral and may therefore be established by extrinsic evidence.

The facts from which bias may be inferred are enormously varied. Any evidence showing that a witness has cause to favor or disfavor one of the parties is relevant. As stated in *McCormick on Evidence* § 40, at 78 (E. Cleary 2d ed. 1972):

> Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility. The kinds and sources of partiality are so infinitely varied to be here reviewed * * *.

Clearly, one of the circumstances from which bias may often reasonably be inferred is membership by the witness and a party in the same voluntary or-

ganization. Persons who chose to join the same group, especially relatively close-knit ones, tend to have something in common. They may know each other personally; they may have mutual friends and acquaintances; or they may share the same goals, beliefs, interests, tastes, or experiences. Common sense and experience indicate that, consciously or not, a member of a close-knit voluntary group is more likely to give testimony favorable to a fellow member than to another party. Common membership in such a group is something that a rational trier of fact would wish to know, and is generally entitled to know, in evaluating credibility. Such evidence easily meets the test of relevancy in Fed. R. Evid. 401, *i.e.*, "evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (emphasis added).

2. As noted, the law permits proof of relationships from which bias may be inferred, including common membership in a group, because of the recognition that such relationships may affect a witness's testimony. Even though members of most organizations are not sworn to lie on each other's behalf, evidence of membership in such organizations is admissible to show bias because the trier of fact is permitted to infer that the witness's testimony may be slanted in favor of a fellow member. In this case, the trier of fact was not called upon to infer from simple shared membership in a prison gang that Mills might have slanted his testimony to protect respondent, a fellow member. Instead, the evidence of common membership was reinforced by direct proof that members of the group were sworn to commit perjury on each other's behalf. Since this direct evidence showed

essentially what the trier of fact would have been permitted to infer from the bare fact that Mills and respondent both belonged to the same group, its admission cannot have been error.

3. The court of appeals' reasons for holding to the contrary were insubstantial. The court reasoned (Pet. App. 5a) that since "the government may not convict an individual merely for belonging to an organization that advocates illegal activity * * * [n]either should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value."

The court confused two fundamentally different concepts: those matters that may be made a crime and those matters that may be considered in determining whether a crime has been committed. For example, it is obvious that characteristics such as race, gender, and age may not be made a crime. But there is no doubt that such characteristics may be proved in criminal trials where relevant. For instance, race or gender may be relevant to identification, and age may be relevant if physical strength is at issue. Proof of group membership stands on the same footing. Even though mere membership generally may not be made a crime, membership may be proved where relevant, including where relevant to show bias.

The court of appeals' pronouncement that "membership, without more, has no probative value" (Pet. App. 5a) is contrary to common sense. In a trial for murder resulting from a rifle shot fired at long range, would the defendant's membership in a rifle club have "no probative value"? In a trial for counterfeiting, would membership in a printer's union be irrelevant? Proof of membership alone would rarely if ever be conclusive, but it would surely be relevant.

Finally, the court of of appeals suggested (Pet. App. 6a) that its decision was necessary to protect Mills's freedom of association. But if First Amendment associational rights are not abridged by proof that a witness is married to the party for whom he or she testifies, we fail to see how Mills's or respondent's First Amendment rights were violated in this case by proof that they belonged to the same prison gang.

4. In sum, no legal rule bars admission of evidence such as that at issue here. That evidence was plainly relevant to show Mills's bias, and after careful consideration and appropriate measures to reduce the risk of prejudice the trial court properly refused to exclude it under Fed. R. Evid. 403. The court of appeals' decision is devoid of precedential or rational support and should be reversed.

ARGUMENT

WITNESS MILLS WAS PROPERLY IMPEACHED WITH REBUTTAL TESTIMONY THAT BOTH HE AND RESPONDENT BELONGED TO A PRISON ORGANIZATION WHOSE MEMBERS WERE SWORN TO COMMIT PERJURY FOR EACH OTHER

A. Proof Of A Witness's Bias Is Always Relevant

The importance of evidence of a witness's bias is well recognized. As this Court has stated: "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974), quoting 3A Wigmore, *Evidence* § 940, at 775 (Chadbourn rev. ed. 1970). Accord, 3 Weinstein & Berger, *Weinstein's Evidence* ¶ 607[03], at 607-30-607-32 (1982); *McCormick on Evidence* § 40, at 78 (E. Cleary 2d ed. 1972); 3 Louisell & Mueller, *Federal Evidence* § 341, at 470-484 (1979). Indeed, that is precisely what respondent was doing in calling Mills to give evidence about Ehle's motive for testifying against respondent, and no one could seriously suggest that such evidence was inadmissible.

Proof of bias is considered so important in assessing the weight to be given to testimony that such proof "is never considered collateral: Extrinsic evidence of bias, or of facts from which it may be inferred, may be introduced even after the witness has denied the bias, or the facts, on cross-examination." 3 Louisell & Mueller, *supra*, § 341, at 470-471 (footnote omitted); see also, *e.g.*, *United States* v. *Frankenthal*, 582 F.2d 1102, 1106 (7th Cir. 1978); *United States* v. *Brown*, 547 F.2d 438, 445-446 (8th Cir.), cert. denied, 430 U.S. 937 (1977); *United States* v. *Harvey*, 547 F.2d 720, 722 (2d Cir. 1976); *United States* v. *Robinson*, 530 F.2d 1076, 1079-1082 (D.C. Cir. 1976); *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir.), cert. denied, 409 U.S. 863 (1972).

Even when the framers of the Federal Rules of Evidence believed that a generic type of evidence was so inherently unreliable as to be inadmissible in connection with general credibility, as in the case of religious beliefs or opinions (Fed. R. Evid. 610), they were careful to note that "disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule." Fed. R. Evid. 610 advisory committee notes (proposed).[9]

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[9] There are other situations in which such extrinsic evidence is admissible to show bias even though it would otherwise be excluded. For example, in *United States* v. *Robinson*, 530 F.2d 1076 (D.C. Cir. 1976), the defendant described his relationship with his alibi witness Luke as a friendship that included occasional borrowing and lending of money between paydays. On cross-examination, the defendant denied any conversations

Tempering the rule that permits proof of a witness's bias is the recognition that "the trial judge may * * * in both civil and criminal cases, impose reasonable limits upon attempts to show bias in the interest of preventing harassment of witnesses, unfair prejudice to parties, confusion of issues, or undue consumption of time, all pursuant to Rules 403 and 611 [of the Federal Rules of Evidence]." 3 Louisell & Mueller, *supra*, § 341, at 471-473 (footnote omitted). That was done here when the trial court prohibited the unnecessary and potentially prejudicial mention of the name of the Aryan Brotherhood.

B. Bias May Be Shown By Proving That A Witness And A Party Belong To The Same Group

Evidence of a witness's bias is admitted because the law recognizes "the slanting effect upon human testimony of the emotion or feelings of the witness

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with an Officer Walker. 530 F.2d at 1079. Luke, the alibi witness, corroborated the defendant's testimony and further denied any business relationship with the defendant (*ibid.*). On rebuttal, Officer Walker testified that Luke had driven the defendant to the scene of a narcotics transaction, that the defendant had told Officer Walker that he and Luke were joint venturers in the drug business, and that Luke had sold drugs to Officer Walker (*ibid.*). Although evidence of bad acts is not admissible to prove a person's character (Fed. R. Evid. 404(b)), the court of appeals upheld the admission of Officer Walker's testimony because it "was aimed at showing specific matters * * * probative of Luke's bias." (530 F.2d at 1080). Once the defendant and Luke had portrayed their relationship as a simple friendship with no business overtones and had denied any contact with Walker, "it was open to the government * * * to reveal aspects of Luke's relationship evidencing a special partiality toward defendant and particular motive to testify falsely on his behalf" (*ibid.* (footnote omitted)).

toward the parties." *McCormick on Evidence*, *supra*, § 40, at 78. Common sense and experience suggest that a witness will tend to give testimony favorable to a party he likes and unfavorable to a party he dislikes. Thus, any evidence from which partiality may be inferred—including common membership in a group—is important in assessing a witness's credibility. As McCormick puts it (*ibid.*):

> Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility. The kinds and sources of partiality are too infinitely varied to be here reviewed * * *.

See also 3 Louisell & Mueller, *supra*, § 341, at 470-484; 3A Wigmore, *supra*, § 949, at 784-786. Another commentator states (3 Weinstein & Berger, *supra*, ¶ 607[03], at 607-30-607-32 (footnotes omitted)): "Relationships between a party and a witness are always relevant to a showing of bias whether the relationship is based on ties of family, sex * * *[,] employment, business, friendship, enmity or fear."

The fact that the group involved in this case is the Aryan Brotherhood rather than, say, the Elks or the Patrolmen's Benevolent Association has no bearing upon the relevance of the evidence of Mills's and respondent's common membership. The inference arising from common group membership—that members may slant their testimony to favor each other—is at least as strong. It is of course undeniable that proof of membership in a controversial or notorious group may carry a far greater risk of unfair prejudice to the party. But that problem is addressed, in this as in other contexts, by Fed. R. Evid. 403, which gives a trial court discretion to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the is-

sues, or misleading the jury," or by certain other factors. Unless the trial court can be said to have erred in its application of Rule 403, the admission or exclusion of evidence of common group membership must be sustained.

Respondent has conceded (Br. in Opp. 2), as he must, that it is permissible to examine a witness's "relationship to [a] party" in order to show bias. But for reasons that respondent does not explain, he draws a distinction between such a "relationship" and common group membership (*ibid.*). In fact, however, common group membership is merely one type of relationship that may exist between a party and a witness. Depending upon the nature of the group, the inference of bias arising from common membership may be stronger or weaker than that arising from other relationships. Common membership in very large, diverse, and loosely knit groups may give rise to little, if any, inference of bias. In the case of other groups, the bonds even among members who do not know each other may be stronger in some respects than ties of family or friendship among many other persons.[10] This would appear to be true of certain organized crime groups and gangs, whose members are sometimes sworn to commit perjury or even murder on each other's behalf.[11] Assessing the probative value of common membership in any particular group is a matter for the trial court, in applying Fed. R. Evid. 403, and ultimately, if the evidence is admitted, for the trier of fact.

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[10] In this case, of course, Mills and respondent did know each other (see J.A. 32).

[11] See, *e.g.*, *United States* v. *Bufalino*, 683 F.2d 639, 647 (2d Cir. 1982) (members of Cosa Nostra "performed murders for one another as a matter of professional courtesy").

C. Evidence That Members Of A Group Are Sworn To Commit Perjury On Each Other's Behalf Is Even More Probative Of Bias Than Evidence Of Mere Common Membership And Is Thus Clearly Relevant

1. In part, the court of appeals appears to have objected to the government's rebuttal evidence because it was *too probative* of Mills's basis. The court wrote (Pet. App. 6a):

> Ehle's testimony was not simply a matter of showing that Abel's and Mills' membership in the same organization might "cause [Mills], consciously or otherwise, to color his testimony." *See* dissent at [Pet. App. 8a]. Rather it was to show as well that because Mills and Abel were members of a gang whose members "will lie to protect the members," Mills must be lying on the stand.

This reasoning is especially faulty. Although members of fraternal organizations, country clubs, alumni associations, professional groups, and most other organizations are not sworn to lie for each other, evidence of membership in such organizations is admissible to show bias because the trier of fact is permitted to infer that the witness's testimony may be slanted in favor of a fellow member. In this case, the trier of fact was not merely called upon to infer from simple shared membership in a prison gang that Mills may have slanted his testimony to protect a fellow member. Rather, that evidence bearing quite rationally on Mills's credibility was reinforced by direct evidence showing essentially what the trier of fact would have been permitted to infer from the bare fact that Mills and respondent both belonged to the same group.

The court of appeals' decision, insofar as it appears to turn on the higher probative value of evidence of agreement to commit perjury, leaves an irrational hole in the permitted methods of establishing a witness's bias. Presumably the court would have allowed the admission of evidence showing that Mills himself had expressed an intent to lie to protect respondent or other members of the Aryan Brotherhood, and the court distinguished the present case from those in which mere group membership is shown and the trier of fact is left to infer that the witness might slant his testimony in favor of a fellow member. If bias may properly be shown in these ways, we fail to see why it may not be established by the evidence introduced in this case.

As Judge Kennedy pointed out in dissent (Pet. App. 8a), if Mills had been a prosecution witness (for example, in a case brought against a member of a rival prison gang charged with having assaulted respondent), it would almost certainly have been error to preclude the defense from showing that Mills and respondent belonged to a group whose members are expected to commit perjury for each other. See *Davis* v. *Alaska*, 415 U.S. at 316-317. There is no reason why defense witnesses should be treated any differently. If, for example, both sides in a criminal trial called members of gangs with tenets similar to the Aryan Brotherhood's (a realistic possibility in light of the proliferation of antagonistic prison gangs), it would be a travesty if the defense could attack the credibility of prosecution witnesses by proving their group membership while the government was barred from introducing similar evidence regarding the defense witnesses.

2. The court of appeals offered several additional reasons why the trial judge should not have admitted

the rebuttal testimony at issue, but none of those reasons is valid.

The court suggested (Pet. App. 6a) that its decision was necessary to protect Mills's freedom of association. However, even if membership in a prison gang were fully protected by the First Amendment (but see *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 125-133 (1977)),[12] the effect upon First Amendment interests in the present case was surely no greater than when a witness is impeached by proof of family relationship. If First Amendment associational rights are not abridged by proof that a witness is married to the party for whom he or she testifies, we fail to see how Mills's or respondent's First Amendment rights were violated in this case by proof that they belonged to the Aryan Brotherhood.[13]

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[12] See also *United States* v. *Fitzgerald*, 724 F.2d 633, 639-640 (8th Cir. 1983) (en banc) (Arnold, J., concurring) (questioning whether membership in Hell's Angels is protected by First Amendment).

[13] In an analogous situation, courts have found no First Amendment infringement from carefully drawn warrants authorizing the search and seizure of indicia of membership in or association with the Hell's Angels. *United States* v. *Rubio*, 727 F.2d 786 (9th Cir. 1983); *United States* v. *Apker*, 705 F.2d 293, 305-306 (8th Cir. 1983), cert. denied, No. 83-600 (Jan. 23, 1984); see *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 565 (1978). Nor have courts, including the Ninth Circuit, found any First Amendment obstacles to the admission of evidence showing identification with, or membership in, a religious organization such as the Black Muslims so long as such association was relevant to the issues at trial. *United States* v. *Akbar*, 698 F.2d 378 (9th Cir.), cert. denied, No. 82-6497 (May 31, 1983); *United States* v. *Dickens*, 695 F.2d 765, 772-774 (3d Cir. 1982), cert. denied, No. 82-6376 (Apr. 18, 1983).

The court of appeals also reasoned (Pet. App. 5a) that since "the government may not convict an individual merely for belonging to an organization that advocates illegal activity * * * [n]either should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value." The court, however, confused two fundamentally different concepts: those matters that may be made a crime and those that may be considered in determining whether a crime has been committed. For example, it is obvious that characteristics such as race, gender, and age may not be made a crime. But there is no doubt that such characteristics may be proved in criminal trials where relevant. For instance, race or gender may be relevant to identification, and age may be relevant if physical strength is at issue. Proof of group membership stands on the same footing. Even though mere membership generally may not be made a crime, membership may be proved where relevant, including where relevant to show bias.

The court of appeals' reasoning suggests that evidence bearing upon a witness's credibility may not be admitted unless it is sufficient to prove a criminal offense. That principle would revolutionize the law of evidence and lead to patently absurd results. For example, under present law a witness may be impeached by proof of his reputation for untruthfulness (Fed. R. Evid 608(a)) even though persons may not be convicted solely because of their reputations. Likewise, although family relationships are not a crime, it is universally recognized that a witness may be impeached by showing that he or she is related to one of the parties. Under the court of appeals' reasoning, all this would have to change. For example, since

motherhood is not a crime, it would seem to follow that a jury could not be permitted to learn that the sincere and convincing witness who testified for the defense was in fact the defendant's mother.

The court of appeals' pivotal pronouncement that "membership, without more, has no probative value" is equally wrong. As previously discussed, membership is relevant to show sympathy with or partiality for fellow members. Proof of membership in a voluntary organization is also relevant to show that the member possesses the group's shared characteristics. Membership may provide evidence that the member possesses a skill (*e.g.*, the Professional Golfers Association) or has undergone an experience (*e.g.*, the Veterans of Foreign Wars). Contrary to respondent's contention (Br. in Opp. 4), membership may be relevant to show numerous personal characteristics, such as intelligence (the Mensa Club), sobriety (a temperance organization), chastity (certain religious orders), or frugality (a payroll savings plan).

Membership is also clearly relevant to show a person's beliefs; people are much more likely to join a group with which they agree than one with which they disagree. The relevance of membership to prove beliefs is illustrated by the hypothetical situation posed by respondent himself (Br. in Opp. 4-5)—"a case where a Ku Klux Klansman is charged with the homicide of [a] black man." In that case, the hypothetical defendant's membership in the Klan would be relevant if the facts suggested that the crime was racially motivated. Evidence that the defendant had personally espoused the Klan's tenets, while obviously more probative than bare proof of membership, would not be essential to show his racial attitudes. The trier of fact would be entitled to infer that a

member of the Klan was sympathetic to the Klan's central beliefs.[14]

A similar inference was entirely permissible in the present case. Having heard evidence that Mills and respondent belonged to a secret prison organization and that members of that group are sworn to lie on each other's behalf, the trier of fact was entitled to conclude that Mills endorsed and put into practice the group's beliefs.[15]

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[14] See *United States* v. *Redwine*, 715 F.2d 315, 316 (7th Cir. 1983), cert. denied, No. 83-6378 (May 29, 1984) (evidence that defendant wore Ku Klux Klan insignia and spoke of his Klan membership admitted in prosecution for violating civil rights statutes).

[15] Unlike the majority below, other courts of appeals have sanctioned proof of membership in highly controversial groups. In *United States* v. *Bufalino, supra*, the defendant was charged with attempting to arrange for the murder of a witness against him. The government's theory was that the defendant could prevail upon a fellow prisoner to commit the murder because "both were members of La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy" (683 F.2d at 647). On direct examination, the defendant claimed that his acquaintance with the other prisoner was based on "chance meetings" (*ibid.*). The Second Circuit held that it therefore "became proper for the government to impeach him by introducing evidence of [his] longstanding relationship with La Cosa Nostra" (*ibid.*). Similarly, in the present case, when Mills denied belonging to a secret prison organization whose members are sworn to lie on each other's behalf, it became proper to impeach him by introducing evidence of his membership in such a group.

In *United States* v. *Mills, supra*, another case involving the Aryan Brotherhood, the defendant (who was not the same person who testified for respondent here) was charged with murdering a fellow prison inmate. The prosecution's theory was that the murder was the result of a "contract" put out by

It should be emphasized that in all of the above examples we are arguing only that proof of membership is relevant, *i.e.*, that it has some "tendency to make the existence of any fact that is of consequence to the determination of the action more prob-

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the Aryan Brotherhood to avenge cheating in a drug transaction. Upholding the admission of testimony on the organization, history, and activities of the Aryan Brotherhood, the Eleventh Circuit wrote (704 F.2d at 1559):

> To make the crime comprehensible to a jury it was necessary for the government to show how the Aryan Brotherhood functioned, that Mills was a member of the Aryan Brotherhood, that an affront to a fellow member might serve as an adequate motivation for Mills to kill a person whom he barely knew, and that it was possible for a member of the Brotherhood incarcerated in one federal prison to communicate the murder contract to another member in a different prison, despite mail censorship and restrictions on inter-inmate correspondence.

The court also upheld the admission of testimony of government witnesses concerning "their intense, deathly fear of the Aryan Brotherhood" (704 F.2d at 1560). The court found that this testimony was properly admitted to counter defense efforts "to impeach the credibility of the government witnesses by proving that they had agreed to testify falsely for the government to manipulate their way into the 'country club' conditions of the Witness Protection Program" (*ibid.*).

In a case involving a series of bombings in 1970 in the Kansas City area, the Eighth Circuit upheld the admission of evidence regarding the history, development and goals of the Students for a Democratic Society (SDS) because it was relevant "to show the association of the appellants with one another prior to the date fixed in the indictment * * *, and the intent, purpose, aim and motives of the parties to the conspiracy." *United States* v. *Baumgarten*, 517 F.2d 1020, 1029 (8th Cir.), cert. denied, 423 U.S. 878 (1975). See also, *e.g.*, *United States* v. *Redwine, supra* (proof of membership in Ku Klux Klan); note 13, *supra* (cases allowing proof of membership in Hell's Angels and Black Muslims).

able or less probable than it would be without the evidence" (Fed. R. Evid. 401). We are not arguing that such evidence must always be admitted; in every case, the trial court would have to consider carefully whether the evidence, although relevant, should nevertheless be excluded under Fed. R. Evid. 403. And we are certainly not arguing that evidence of membership in a voluntary group is conclusive proof that the member shares his co-members' beliefs or other attributes, or even that he likes his fellow members. Evidence refuting the proof of bias would be admissible, and certainly such evidence was not barred here.

D. The District Court In This Case Properly Concluded That The Probative Value Of The Evidence At Issue Outweighed The Possibility Of Unfair Prejudice

Since the government's rebuttal evidence was clearly relevant to show bias, the only remaining question is whether the trial judge properly refused to exclude that evidence under Fed. R. Evid. 403. As previously noted, Rule 403 allows a trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court's ruling under Rule 403 must be affirmed unless it constitutes a clear abuse of discretion. See *United States* v. *Alessandrello*, 637 F.2d 131, 146 (3d Cir. 1980); *United States* v. *Ford*, 632 F.2d 1354, 1377 (9th Cir. 1980); *United States* v. *Masters*, 622 F.2d 83, 88 (4th Cir. 1980).

As Judge Kennedy concluded in dissent (Pet. App. 10a), the trial court's ruling in this case was well within its discretion. Before deciding to admit the

contested rebuttal testimony, the district court gave extensive audience to the arguments of counsel and carefully balanced the relevant factors. The court concluded (J.A. 29):

> There's no question that this evidence is probative, relevant, admissible, as it goes directly to the credibility of Mr. Mills and is at the heart of the credibility of Mr. Mills. Certainly his testimony is a critical area in this case, because it reflects directly upon the Government's "star witness," and the government should be entitled by fair means to assess and attack the credibility of that particular witness.
>
> Based upon the offer of proof, which is a substantial offer of proof * * * it seems to the Court that the Government should be entitled to attack the credibility of Mr. Mills. I have determined that the probative value of this evidence does outweigh the prejudicial value * * *.

Although the court decided to admit proof of Mills's and respondent's membership in a group whose members were sworn to lie on each other's behalf, the court barred any mention of the group's potentially inflammatory name and insisted that it be called only a secret prison organization. The court also offered to give an instruction limiting the testimony regarding the group to the issue of credibility.

It is true that respondent's membership in a secret prison organization was not directly relevant to his guilt or innocence on the bank robbery charge and would have been inadmissible in the prosecution's case-in-chief under Fed. R. Evid. 404(b). Had respondent not chosen to offer Mills as a witness, there would have been no risk of prejudicing him in the eyes of the jury on the basis of his membership. But once he decided to offer Mills's testimony, any specu-

lative prejudice to him was outweighed by the clear need to permit the jury to learn the powerful evidence of bias without which Mills's credibility could not be fairly assessed.

There is no basis for reversing the trial court's application of Rule 403.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 83-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, *Petitioner*,

v.

JOHN CLYDE ABEL, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Pursuant to Rule 34.2 of the Supreme Court Rules respondent submits the following statement of the case to correct and add to the factual background presented by petitioner.

1. The admission of the disputed evidence regarding the Aryan Brotherhood, referred to at trial as a "secret prison organization," was discussed in chambers prior to the trial. At one point during these discussions, petitioner conceded that references to the Aryan Brotherhood and respondent's involvement would be irrelevant unless respondent took the stand. (R.T. 36).[1] Later in the discussions, petitioner changed its position and argued that evidence of membership in the Aryan Brotherhood was admissible to impeach Mills' credibility. (J.A. 8-9).

Respondent repeatedly objected to any references to the Aryan Brotherhood or to the mention of specific tenets of the organization. Respondent objected on relevancy grounds (J.A. 9, 10, 14), and on the basis that the prejudice outweighed the probative value. (J.A. 14, 18, 19, 27, 29).[2]

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[1] "R. T." refers to Reporter's Transcript; J.A. refers to Joint Appendix; "Pet. Brief" refers to Petitioner's Brief.

[2] At page five of petitioner's brief, a partial quote of defense counsel's objection to any use of the Aryan Brotherhood is set out. Petitioner argued that the court's ruling that "a secret, prison organization" query was permissible eliminated the basis of defense counsel's objection. This argument is based on a misreading of respondent's objections. (J.A. 38). Defense counsel not only objected to the use of the phrase "Aryan Brotherhood" but she stated she had the same objections made in chambers earlier and she objected to any reference to any motto, (J.A. 38), of the Aryan Brotherhood. The court also on the record noted that objections made in chambers were not waived.

Specifically, respondent objected to the proposed cross-examination of Mills. Respondent suggested that the only permissible cross-examination of Mills should be: "Isn't it true that Abel has ordered you to give this testimony? Isn't it true that you're lying, that you're doing this to help your friend Abel?" (J.A. 19).

During these *in camera* discussions the trial judge articulated his thoughts about the admission of "Aryan Brotherhood" references. Initially he stated that he failed to see how such evidence could be relevant and noted that it was unduly prejudicial. (R.T. 38). The district judge's final ruling on this issue, however, was that the disputed evidence went directly to the credibility of Mills and, thus, petitioner would be permitted to attack the credibility of Mills by references to the Aryan Brotherhood. (J.A. 29).

During petitioner's direct examination of Kurt Ehle, Ehle was permitted to testify that both Mills and respondent were members of a secret, prison organization (J.A. 41); that respondent was a ranking member of the organization (J.A. 42); and that the organization had a creed that all members must deny their membership and "lie, cheat, steal, kill" or do anything else to protect another member. (J.A. 43).

Petitioner tried in its examination of Ehle to elicit further information about the organization. Petitioner asked Ehle about the measures used by the organization if one disobeyed the code. (R.T. 43). The trial court sustained the objection to this question. In response to a question by petitioner concerning whether Ehle had told

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At page six of petitioner's brief, it is stated that defense counsel objected under Federal Rules of Evidence 608 and 403, "but did not elaborate." Petitioner fails to note that this objection was sustained by the trial court making elaboration by defense counsel unnecessary. (J.A.43).

Mills he (Ehle) was fabricating a story about respondent, Ehle stated: "In view of the fact of how close Mills and Abel were, it would be suicide. . . ." (J.A. 44). Petitioner then asked Ehle: "Why do you say it would have been suicide?" Ehle replied: "The penalty for that's death." (J.A. 44). Although the court sustained objections to this line of questioning, petitioner persisted in the same line of questioning, asking Ehle: "Your fear of harm from the secret prison. . . ." Respondent's objection was once again sustained.

Petitioner's brief quotes a statement by defense counsel allegedly admitting the relevance of certain questions about membership. (Pet. Brief p. 4). This quote, however, is taken out of context. Defense counsel's remarks were made, instead, in response to a hypothetical posed by the trial judge. (J.A. 28). Prior to addressing this hypothetical, defense counsel had argued that the proposed questioning of Mills and Ehle concerning the Aryan Brotherhood was irrelevant to the bank robbery charge against respondent. (J.A. 27). Such objection was never withdrawn.

2. On appeal the United States Court of Appeals for the Ninth Circuit reversed respondent's conviction. The court of appeals noted that although a trial court has broad discretion to admit or exclude evidence, this discretion does not extend to allowing impeachment by association. (Opinion p. 7) The court of appeals held that the trial judge had committed error in allowing Mills to be impeached because of his alleged membership in an organization. Although no evidence was introduced that Mills accepted or complied with the alleged protective perjury tenets of the Aryan Brotherhood, the district court erroneously allowed his impeachment by association with a group that allegedly followed these tenets. The error was reversible because Ehle's testimony implicated the re-

spondent as a member of the organization. Because respondent had not taken the stand, the evidence clearly was not impeachment of him. Rather, this evidence served merely to prejudice respondent by mere association.

SUMMARY OF ARGUMENT

Robert Mills, a defense witness, was improperly impeached by the admission of evidence that both he and respondent belonged to a secret, prison organization whose members were sworn to lie, cheat, steal or kill to protect each other. No evidence was introduced that Mills had personally adopted or complied with the tenets of the organization; nor was there any evidence that Mills had ever lied or expressed a willingness to lie. Thus, the impeachment of Mills was based on his association alone. The error was reversible because the impeachment implicated the respondent who was unable to refute the membership because he had not taken the stand.

1. The existence of a witness' bias is relevant. Questioning a witness regarding his acquaintance or relationship with a party to an action is, thus, permissible cross-examination to elicit possible bias. The cross-examination of Mills, however, was not to elicit possible bias. The cross-examination extended well beyond the permissible scope of inquiry regarding his ties to respondent. Rather, in violation of Rule 608(b) of the Federal Rules of Evidence the interrogation directly attacked Mills' general credibility. Mills was questioned regarding the restrictive aspect of the membership of the secret, prison organization; he was likewise interrogated about the alleged perjury tenet of the organization. The evidence sought did not have a tendency to show bias since it is the shared membership itself which might show bias. The perjurious tenets of the organization itself show a

lack of veracity, but not bias. Thus petitioner's cross-examination was an attack on the general credibility of Mills, rather than an exposure of bias.

2. When Mills was cross-examined regarding membership in the secret, prison organization, he denied being a member and denied even knowing of such an organization. (J.A. 39). In violation of Rule 608(b) of the Federal Rules of Evidence, petitioner was permitted to introduce rebuttal evidence to impeach Mills. This evidence consisted of calling Kurt Ehle to testify that both Mills and respondent were members of a secret, prison organization; that the organization required its members to swear to lie, cheat, steal or kill to protect another member.(J.A. 42). Rule 608(b) prohibits the admission of extrinsic evidence of specific instances of the conduct of a witness for the purpose of attacking his credibility. *See United States* v. *Woods*, 550 F.2d 435 (9th Cir. 1976). Notwithstanding case law to the contrary, and the clear prohibition of Rule 608(b), Mills' general credibility was impeached solely on the basis of his alleged membership in a secret, prison organization.

3. Evidence of membership was irrelevant to the charge of bank robbery. This evidence served an improper purpose—to prejudice respondent by inflaming the jury. The intentional references to a secret, prison organization portrayed respondent as a ruthless and odious individual—a "bad person." This evidence of membership had no direct relationship with the charge; nor was such membership inextricably intertwined with the charge such that it was necessary for a proper understanding of the charges. *United States* v. *Bufalino*, 683 F.2d 639 (2d Cir. 1982), *cert. denied*, 459 US. 1104 (1983) and *United States* v. *Mills*, 704 F.2d 1553 (11th Cir. 1983) illustrate the types of cases where evidence of membership has

been found permissible. *Abel*, unlike *Bufalino* and *Mills*, did not involve a chain of facts which necessitated the introduction of such evidence.

4. Aside from being improper, petitioner's attack on Mills' credibility was without foundation. There was no evidence Mills had ever adopted the tenets of the organization. Nor was there any evidence he had ever lied or expressed a willingness to lie. In the absence of such evidence, the impeachment of Mills' based on mere membership was improper. Such impeachment was analogous to impeachment due to "bad company." Credibility or lack thereof is a personal trait and not one that can be imputed to a person based on one's relationships, associations or friendships. *See United States* v. *Ochoa*, 604 F.2d 198 (5th Cir. 1980).

Further, *Scales* v. *United States*, 367 U.S. 203 (1960) and *Brandenburg* v. *Ohio*, 395 U.S. 444 (1968) make clear that merely joining an organization is not dispositive of a person's acceptance of the organization's tenets. A Caucasian man may join a prison organization for protection but may not espouse the tenets of the organization. Thus, an attack on a witness' credibility based solely on his membership is improper cross-examination and rebuttal testimony.

5. Even assuming that the disputed evidence proved bias, the trial judge abused his discretion in declaring the evidence admissible. There are limitations on a court's discretion to allow evidence to show bias. The test is generally whether the jury is "otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue." *Skinner* v. *Cardwell*, 564 F.2d 1381 (9th Cir. 1977). In this case, before the disputed examination occurred, the prosecutor had elicited or had an opportunity to elicit sufficient information for the jury to judge the possible bias of Mills. Failure by the judge to limit the cross-examination of Mills resulted in substantial prejudice to respondent. As a result of the judge's failure to exercise proper discretion, the jury heard references to a secret, prison organization, perjury oaths, death threats and suicide missions. (J.A. 42, 43, 44).

6. Finally, even if relevant, the prejudice of the disputed evidence far outweighed its probative value. The evidence presented respondent as a member of a ruthless organization of liars, cheats, thieves, and killers. The inflammatory evidence raised the serious danger that respondent was convicted of being a "bad man" rather than a bank robber.

ARGUMENT

A. Mills Was Improperly Impeached By Evidence That He And Respondent Belonged To A Secret, Prison Organization That Required Its Members To Commit Perjury To Protect Other Members.

1. The disputed cross-examination of Robert Mills was introduced to attack his credibility, not to show bias.

Impeachment by showing that a witness is biased rests on two assumptions: (1) that certain relationships impair the impartiality of a witness, and (2) that a witness who is not impartial may shade his testimony in favor of or against one of the parties. *J. WEINSTEIN and M. BERGER, WEINSTEIN'S EVIDENCE* § 607[03] at 607-23 (1982 Ed.) (hereinafter *Weinstein's Evidence*). Since bias of a witness is relevant to assess credibility, a witness may be cross-examined regarding his relationships with a party.

Petitioner cross-examined Robert Mills regarding his and respondent's alleged membership in a secret, prison

organization that required its members to take a perjury oath.[3] These questions were not introduced to show that Mills might be biased in favor of respondent due to their common membership. Rather, they were introduced to attack Mills' general credibility. Such attack is prohibited by Rule 608(b) of the Federal Rules of Evidence.

A witness in a trial may be asked if he shares common membership with a party to an action. Such common membership can at times impair a witness' partiality. Petitioner in this case, however, went much further than merely asking questions designed to elicit such bias. He questioned Mills regarding the tenets of a secret, prison organization.

Evidence that members of an organization have sworn to commit perjury does not show bias. The perjury oath does not enhance in any way the association between two individuals. Rather, such evidence goes directly to the general credibility or veracity of the witness. The argument is no longer that the witness' testimony should be weighed with great caution because he might be biased; the argument becomes that the witness should be disbelieved entirely because he belongs to an organization that requires its members to lie.

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[3] Q Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?

A No, I don't.

Q Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that the members thereof will first of all deny they belong to that secret organization?

A No, I don't.

Q And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in that secret organization, prison organization?

A I know of no organization like that. (J.A. 39).

Rule 608(b) authorizes inquiry into specific instances of misconduct *if* these instances are "clearly probative of truthfulness or untruthfulness." Federal Rules of Evidence 608(b). An examination of the case law in this area reveals that the instances of misconduct must be by the witness himself, not by an organization.

This proposition can best be exemplified by a hypothetical. Assume that a party has in his possession a letter from a witness wherein he apologizes to a judge for lying in court. The attorney cross-examining the witness may properly ask: "Isn't it true you have lied in court before?" Rule 608(b) permits this inquiry because it is clearly probative of the witness' *personal* character for untruthfulness.

Petitioner argued that because it was proper to show bias through common membership in an organization, evidence that members of an organization are sworn to commit perjury on each other's behalf was even more probative of bias than evidence of mere common membership. (Pet. Brief p. 17).[4]

Although petitioner's initial premise is sound, the ultimate conclusion is not based on logic or case law, but on the naked desire to have the evidence admitted. Petitioner appears to confuse two concepts—bias and credibility. Bias may be shown to *prove* credibility or lack thereof. Petitioner's argument seeks to expand Rule 608(b) which was intended to be restrictive. *See Weinstein's Evidence* § 608[05] at 608-33. Petitioner's argument would allow a wholesale attack on the credibility of every witness by inquiry into every instance of conduct whether these were or were not probative of truthfulness. A trial would

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[4] Although petitioner argued that the cross-examination was proper to show bias, petitioner failed to explain or precisely identify how the questions were probative of bias.

thus degenerate to inquiries which would waste time and confuse the jury.

2. Extrinsic evidence of specific instances of misconduct may not be introduced to attack the credibility of a witness.

Rule 608(b) prohibits admission of extrinsic evidence of specific instances of the conduct of a witness for the purpose of attacking or supporting his credibility. If a witness denies on cross-examination an instance of alleged misconduct pertaining to a collateral matter, the answer stands and witnesses may not be called to rebut it. *See United States* v. *Woods*, 550 F.2d 435, 441 (9th Cir. 1976); *United States* v. *Robinson*, 530 F.2d 1076, 1079 (D.C. Cir. 1976). *See also Weinstein's Evidence* § 608[05] at 608-22.

In this case it is clear that the cross-examination of Mills regarding his membership in the secret, prison organization was introduced not to show bias, but to attack his general credibility. When Mills was asked about and denied membership in the secret, prison organization, petitioner was bound by that denial and the district court should not have allowed petitioner to call Kurt Ehle to impeach Mills. Ehle was allowed to testify not only that Mills was a member of a secret, prison organization, but that respondent was also a member. Ehle's testimony went far beyond mere impeachment of Mills' denial of membership when he was allowed to testify that each member of the organization was required to lie, cheat, steal or kill for another member.

This is precisely the situation that the District of Columbia Circuit had in mind when it observed as follows: "If the witness stands his ground and denies the alleged misconduct, the examiner must 'take his answer' and cannot call other witnesses to prove the discrediting acts

lest the trial spin off into a series of subtrials on collateral issues . . ." *United States* v. *Robinson*, 530 F.2d at 1079. In the case at bar, there is no question that the trial on the bank robbery charge was overshadowed by the infusion of evidence of a secret, prison organization and its evil tenets.

The *Robinson* court did note that there was an exception which did not "limit or exclude proof of conduct by the witness evidencing a specific bias for or against a party." The first question directed solely at whether Mills and respondent were members of the same organization was proper cross-examination to show bias. The membership of Mills in an organization with respondent could arguably have been an indication of a "specific bias" by the witness and thus permitted under the exception. The questions following the initial inquiry about common membership, however, were designed to show that the witness lacked credibility, not to show a specific bias. Consequently, the later questions pertained to a collateral matter and petitioner should have been precluded from asking them because of Mills' denial of membership. That this should have been the proper course at trial finds support in *United States* v. *Woods*, 550 F.2d 435 (9th Cir. 1976). In that case, a key government witness denied he was wanted for auto theft in Mexico. A defendant in the case sought to call a Mexican police officer to testify that the witness was wanted in Mexico for auto theft. The Ninth Circuit found this evidence to be extrinsic proof on a collateral matter. Although the proof would have shown that the witness was lying on the stand, this proof went to his general credibility as a witness, and, thus, was prohibited by Rule 608(b).

The district court in this case allowed petitioner to do precisely what is prohibited by the Federal Rules of

Evidence and the existing case law; *to wit*, impeach Mills' general veracity.

3. The intentional references to a secret prison organization had no relevance to the charge.

Even under the liberal standard of relevancy enunciated in Rule 401 of the Federal Rules of Evidence, the evidence elicited and proffered by the government was not relevant.

Petitioner failed to adequately articulate how this type of membership evidence was in any way probative of any issue in the case. The issue in the case was identity. Clearly the references to the secret, prison organization did not assist in resolving the main issue of identity. A review of the record reveals that the references to membership were for one sole reason—to inflame the jury.[5]

References to membership in an organization have been permitted in some cases. They have been permitted, however, only when the membership is directly related to the charge; or when it is very difficult to draw a line between the charge and other wrongful circumstances with which it is inextricably intertwined; or if it is necessary in order to complete the story of the crime on trial. *See United States* v. *Mills*, 704 F.2d 1553, 1559 (11th Cir. 1983).[6]

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[5] *See Pierson* v. *Ray*, 386 U.S. 547 (1967). (A conviction based on irrelevant and prejudicial evidence can be the basis for a reversal.) *See* also *United States* v. *Marques*, 600 F.2d 742 (9th Cir. 1979), *cert. denied*, 444 U.S. 1019 (1980); *United States* v. *Love*, *534 F.2d 87 (6th Cir. 1976)*. (It is reversible error for a prosecutor to intentionally inject into a trial the spectre of organized crime where it serves no proper purpose and is without foundation in the evidence.)

[6] The *Mills* court cautioned that the evidence was still subject to the probative versus prejudicial test of Rule 403 of the Federal Rules of Evidence.

Two cases illustrate these principles and, in doing so, establish the irrelevance of the disputed evidence in this case. In *United States* v. *Bufalino*, 683 F.2d 639 (2d Cir. 1982); *cert. denied*, 459 U.S. 1104 (1983) the government was permitted to impeach defendant with evidence of his longstanding relationship with La Cosa Nostra. This was permitted because defendant testified falsely that his acquaintance with Fratianno was based on "chance meetings." Defendant's associational ties became relevant because without it, "it was unlikely that the jury would believe that Fratianno would agree to commit the crime . . . ."[7] *Id.* at 647. Thus, in *Bufalino*, the purpose of the references to La Cosa Nostra were not to show that defendant was a mobster; rather, the issue of such membership became an integral part of the government's proof of motive and necessary to link the defendant with the "hit-man" James Fratianno.

In *United States* v. *Mills*, 704 F.2d 1553 (11th Cir. 1983), a federal prisoner was prosecuted for the murder of another prisoner. The government's theory was that the murder was committed pursuant to a contract by the Aryan Brotherhood—a prison gang which attempted to control drug traffic within the institution. The court admitted testimony on the organization, history and activities of the Aryan Brotherhood. The court concluded that this testimony

> pertained to a chain of events forming the context, motive, and set-up of the crime. To make the crime comprehensible it was necessary for the government to show how the Aryan Brotherhood functioned, that Mills was a member of the Aryan Brotherhood, that

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[7] The government's theory was that Bufalino could prevail on Fratianno to have Napoli killed because both were members of La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy. 683 F.2d at 647.

> an affront to a fellow member might serve as an adequate motivation for Mills to kill a person whom he barely knew . . . .

Id. at 1559. In *Mills*, membership in the Aryan Brotherhood became an integral and natural part of the government's account of the crime.

In the instant case, the reference to a secret, prison organization was not linked in any manner to the crime charged; it did not form part of the account of the circumstances of the crime nor was the reference necessary to complete a story of the crime charged. Indeed, the charge was a simple bank robbery. The issue at trial was identity, and the prosecution's theory of the case in no way implicated any association or group as the perpetrator. It is clear that this disputed evidence was not related to petitioner's proof of the charged crime—bank robbery.

4. Mere membership in an organization does not prove that a member has espoused the beliefs of the organization.

Mills' impeachment was based on his alleged membership in an organization which required its members to lie, cheat, steal or kill for another member. The impeachment resulted from Mills' alleged membership alone. There was no evidence that he had, in fact, accepted the tenets of the organization. Nor was there any evidence that he had ever lied or expressed a willingness to lie.

The impeachment of Mills was, thus, a prejudicial ploy to taint his character through "guilt by association." By permitting this impeachment, the district court failed to recognize that credibility or lack thereof is a personal trait. A witness should not be impeached on the basis of his membership. To permit such impeachment is analogous to permitting a witness' impeachment because he has friends or relatives who are liars. Case law abundantly shows that a witness should not be cross-examined or impeached because of his associations. *See United States* v. *Ochoa*, 609 F.2d 198, 204 (5th Cir. 1980) (cross-examination with respect to offenses of defendant's brother, brother-in-law, and friend constituted prejudicial error); *United States* v. *Vigo*, 435 F.2d 1347, 1351 (5th Cir.), *cert. denied*, 403 U.S. 908 (1971) (cross-examination with respect to the prior heroin conviction of defendant's husband warranted reversal). *See also United States* v. *Labarbera*, 581 F.2d 107, 109 (5th Cir. 1978); *United States* v. *Turcotte*, 515 F.2d 145 (2d Cir.), *cert. denied*, 423 U.S. 1032 (1975); *United States* v. *Crawford*, 438 F.2d 441 (8th Cir. 1971); *United States* v. *Gosser*, 339 F.2d 102, 112 (6th Cir.), *cert. denied*, 382 U.S. 819 (1964).

In the case at bar, Mills was impeached not because he had lied previously or even because he had a reputation for lying. Rather, he was impeached because the organization to which he allegedly belonged asked its members to lie. Petitioner argues that the impeachment of Mills was proper.[8] Petitioner obviously ignores the abundance of support in law for the proposition that a witness cannot be discredited because of his alleged association with "bad people."

Petitioner's insistence about the admissibility of the disputed evidence results from an incorrect premise. Petitioner argues that the evidence of the perjury oaths showed the jurors what they would have been permitted to infer from the fact that Mills and respondent belonged to the same group.[9]

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[8] Petitioner cites no case law or treatise to support its argument.

[9] Petitioner makes no distinction between showing partiality or proving perjury. The mother of a defendant if called by the defense may be cross-examined regarding her relationship with the defendant. The trier of fact should, of course, be apprised of her relationship

Petitioner ignores the fact that membership in an organization alone, is insufficient to prove a person's beliefs or practices. For example, one may join Alcoholic's Anonymous, but not remain sober. One may join an athletic club but not be an athlete. One may join a ski club but have never skied before. There are many diverse reasons why people join clubs and organizations. Further, one cannot assume that members of an organization would be willing to "color their testimony" or risk perjury charges to favor and protect an accused member.

Two cases decided by this Court further illustrate the principle that merely joining an organization is not dispositive of the member's acceptance of the organization's beliefs or tenets. *See Scales* v. *United States*, 367 U.S. 203 (1960); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1968).

In *Scales*, this Court recognized that a person's association with a particular group cannot be used against an individual unless it is proven that the individual is an "active" and "knowing" member of the organization. *Scales*, 367 U.S. at 209.

Although *Scales* presents distinguishable facts from the present case, the reasoning propounded by the Court is certainly applicable. *Scales* involved a statutory prosecution for membership in the Communist Party. To sustain a conviction under the Smith Act, *Scales* required a showing of both a member's knowledge of the organization's illegal advocacy and "active" membership therein.

In the later case of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1968), a leader of the Ku Klux Klan was convicted under

and weigh this factor in its consideration of the weight to give her testimony. The fact of her relationship, however, does not *prove* she is lying. There is a distinction, therefore, between the possible slanting of one's testimony and the actual commission of perjury. Petitioner failed to recognize this distinction.

an advocacy statute. *Brandenburg* held that the statute purported to punish mere advocacy. Its effect was to forbid assembly with others to advocate the beliefs of the Ku Klux Klan. The Court held mere advocacy was insufficient to justify punishment. The Court required that the advocacy create a clear and present danger before criminal prosecution of an individual was permissible under the first amendment. *Id.* at 450-51.

The discussions in *Scales* and *Brandenburg* recognize that individuals join organizations for a variety of reasons. One may become a card carrying member of the Communist Party and believe and support the economic system it represents, but not adopt all the tenets of the organization. Not all members, however, are "active" (as required by *Scales* and *Brandenburg*) so as to justify prosecution. Nor would all members be willing to support a violent overthrow of the incumbent government, though this is a tenet of Communism. Therefore, although a member may hope for a "better system," he may not actively participate in bringing about such a change if it requires violence.

Similarly, a Caucasian man incarcerated in a federal prison may join the Aryan Brotherhood for protection in light of the frequent racial confrontations. Yet, simply joining the organization does not mean he would deny the organization's existence nor does it mean he would commit perjury for another member.[10] For the same reasons that membership alone is insufficient to support any criminal conviction, mere membership here should not have

[10] Ehle himself testified to being directly connected with the Aryan Brotherhood; yet he testified to the organization's existence and the alleged tenets in violation of the organization's code. (J.A. 44).

been allowed for impeachment purposes.[11] There was no direct evidence that Mills had accepted or complied with the alleged perjury oath. The organization's tenets established nothing about his own beliefs and practices. Thus, the rebuttal testimony of Ehle was improperly admitted to impeach Mills.[12]

5. Assuming the impeachment evidence showed bias, the trial judge abused his discretion in permitting its introduction.

Assuming that the disputed cross-examination and rebuttal testimony bore on Mills' bias, the trial court, nevertheless, abused its discretion in permitting its introduction. The disputed evidence should have been precluded because there were other adequate means to show bias that did not infringe on respondent's right to a fair trial.

Although a trial court has great leeway in how and when bias may be proven, *Davis* v. *Alaska*, 415 U.S. 308

[11] Although petitioner argued that evidence refuting the government's theory regarding the bias of Mills could have been offered, any attempt to do so would have been futile. The only way to effectively refute the proffered Ehle testimony would be if Mills admitted his membership but denied accepting the organization's tenets, *i.e.*, he would not commit perjury to protect another member. Since Mills had already denied his membership, this was not a feasible alternative. Moreover, even if there was a feasible alternative, the evidence remained inadmissible.

[12] Petitioner argued that the Ninth circuit erroneously considered Mills' first amendment associational rights. (Pet. Brief at 19). Petitioner misinterpreted the court of appeal's decision. The court of appeals at no time indicated that Mills' associational rights had been abridged. Rather, the court stated that the judge's discretion in admitting evidence did not extend to allowing impeachment by association. The court was clearly concerned about the relevancy of the witness' association. The references to the first amendment cases of *Scales* and *Brandenburg* were illustrative .

(1974), there are limitations on introducing evidence to establish bias. *See Blair* v. *United States*, 401 F.2d 387, 389 (D.C. Cir. 1968). First, the profferred evidence must tend to show bias is more or less probable than it would be without it. Second, the judge has discretion to limit the extent of the proof.[13] In exercising this discretion a judge should consider all the particular circumstances in a given case.

In *Skinner* v. *Cardwell*, 564 F.2d 1381 (9th Cir. 1977), *cert. denied*, 435 U.S. 1009 (1978), the Ninth Circuit discussed this exercise of a judge's discretion. It was stated in *Skinner* that the test to apply was based on whether counsel has been afforded an adequate opportunity to cross-examine a witness. "The test for whether cross-examination about a relevant topic was effective, i.e., whether the trial court has abused its discretion, is whether the jury is otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue." *Id.* at 1389, *See* also *United States* v. *Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982); *United States* v. *Salsedo*, 607 F.2d 318, 321 (9th Cir. 1979); *United states* v. *Bleckner*, 601 F.2d 382, 385 (9th Cir. 1979).

In any criminal case the judge has discretion to admit extrinsic proof. He also has, however, "the responsibility for seeing that the sideshow does not take over the circus." *United States* v. *Brown*, 547 F.2d 438, 446 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977). In this case, the trial judge abused his discretion by allowing cross-examination of Mills that unfairly prejudiced respondent. Before the objectionable testimony was elicited, the jury had sufficient information to apprise the bias and motive

[13] A third unrelated limitation is exclusion due to constitutional exclusionary rules such as the privilege against self-incrimination.

of Mills. The prosecutor elicited that Mills was a friend of respondent's and that he (Mills) had become acquainted with him over a nineteen month period.[14] The prosecutor had also inquired if Mills and respondent belonged to an organization together. Mills denied such membership. In permitting petitioner to impeach Mills with evidence that he allegedly belonged to a secret, prison organization that had as one of its tenets that its members would lie for one another, the district court allowed "the sideshow" to "take over the circus." The jury necessarily lost focus of the charge—bank robbery. There were references to secret, prison organizations, restrictive membership, perjury oaths, death threats and suicide missions. (J.A. 42, 43, 44). Using a very wide brush, petitioner painted an odious picture of respondent. He was portrayed as an evil person who lied, cheated, stole and killed.

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[14] Q Now, you say you're a real close friend of Mr. Abel?

A No. I'm—I wouldn't say a real close friend. We were acquaintances. We were friends. I knew him; he knew me.

Q How did you know him?

A Well, when he was on—I'll refer to the main line as "population"—I was in the hole for about nineteen months. I came to the visiting room every day, and I would see John out there, and periodically got to know him over that nineteen months.

Q Where was this main line?

A That's the population of the prison.

Q What prison?

A Lompoc.

Q All right. Do you and John, Mr. Abel, belong to any organization together?

A No, I don't (J.A. 36).

The prosecutor had the opportunity to pursue this proper line of questioning but chose not to do so. Thus, he could have properly asked Mills regarding the quality, quantity and nature of his contacts with respondent.

B. The Prejudicial Harm Of The Evidence At Issue Outweighed Its Probative Value.

Even if relevant, the admission of the disputed evidence was so prejudicial that the trial judge should have excluded the evidence pursuant to Rule 403 of the Federal Rules of Evidence. The introduction of the disputed evidence presented a picture of a ruthless organization of liars, cheats, thieves and murderers. Failure to have excluded this evidence constituted a clear abuse of discretion.

Petitioner failed to specifically address the prejudice to respondent. This failure is understandable since it is impossible to argue there was no prejudice given the inflammatory evidence that was presented. The trial was replete with references to a secret, prison organization and its accompanying odious tenets.

Ehle testified that the oath taken by members was that they would "lie, cheat, steal, kill," and do anything to protect another member; (J.A. 43); that it would be suicide for him (Ehle) to have told Mills he would testify falsely against respondent; (J.A. 44); that the penalty for doing such a thing was death. (J.A. 44). By referring to the organization by the perjorative term—"secret, prison organizaton"—the spectre of organized crime in prison was presented to the jury. Although respondent did not testify, Ehle testified that respondent was a "ranking member" of the secret, prison organization. (J.A. 42). The testimony introduced was of such an inflammatory nature as to create the serious danger that respondent was convicted in the eyes of the jury for being a "bad man," deserving of punishment, rather than of being a bank robber. *See United States* v. *Robinson*, 530 F.2d 1076, 1078-79 (D.C. Cir. 1976) (citing *United States* v. *Fox*, 473 F.2d 131, 135 (1972) (D.C. Cir. 1972). This

evidence was so prejudicial that it surely persuaded the jury to prejudge respondent as a bad man and thus deny him a fair opportunity to defend against the particular charge. *See Michelson* v. *United States*, 335 U.S. 469, 476 (1948).

Petitioner readily conceded that respondent's membership in the secret prison organization was not directly relevant to his guilt or innocence on the bank robbery charge and would have been inadmissible in the prosecutor's case-in-chief. (Pet. Brief at 25). Petitioner argued, however, that because respondent called Mills as a witness he necessarily brought upon himself such prejudice. There arose a "clear need to permit the jury to learn the powerful evidence of bias without which Mills' credibility could not be fairly assessed." (Pet. Brief at 26).

Even assuming that such a need arose, and that the rebuttal evidence showed bias, such evidence should not have been introduced because of the prejudice to respondent. Mills' alleged bias could have been shown by proving that Mills knew respondent, that they were friends and that they belonged to an organization together. The rest of the evidence did not prove bias, but clearly did prejudice the respondent.

The error in this case was reversible because respondent did not take the stand. As such, he did not put his credibility in issue. Yet, the prosecution, nevertheless, attacked his charcater through Kurt Ehle. Ehle's testimony implicated respondent as a sworn perjurer and respondent was convicted not for being a bank robber, but for belonging to a ruthless and odious organization.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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